# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1921

No. [redacted]166

ARTHUR J. DAHN, PETITIONER,

vs.

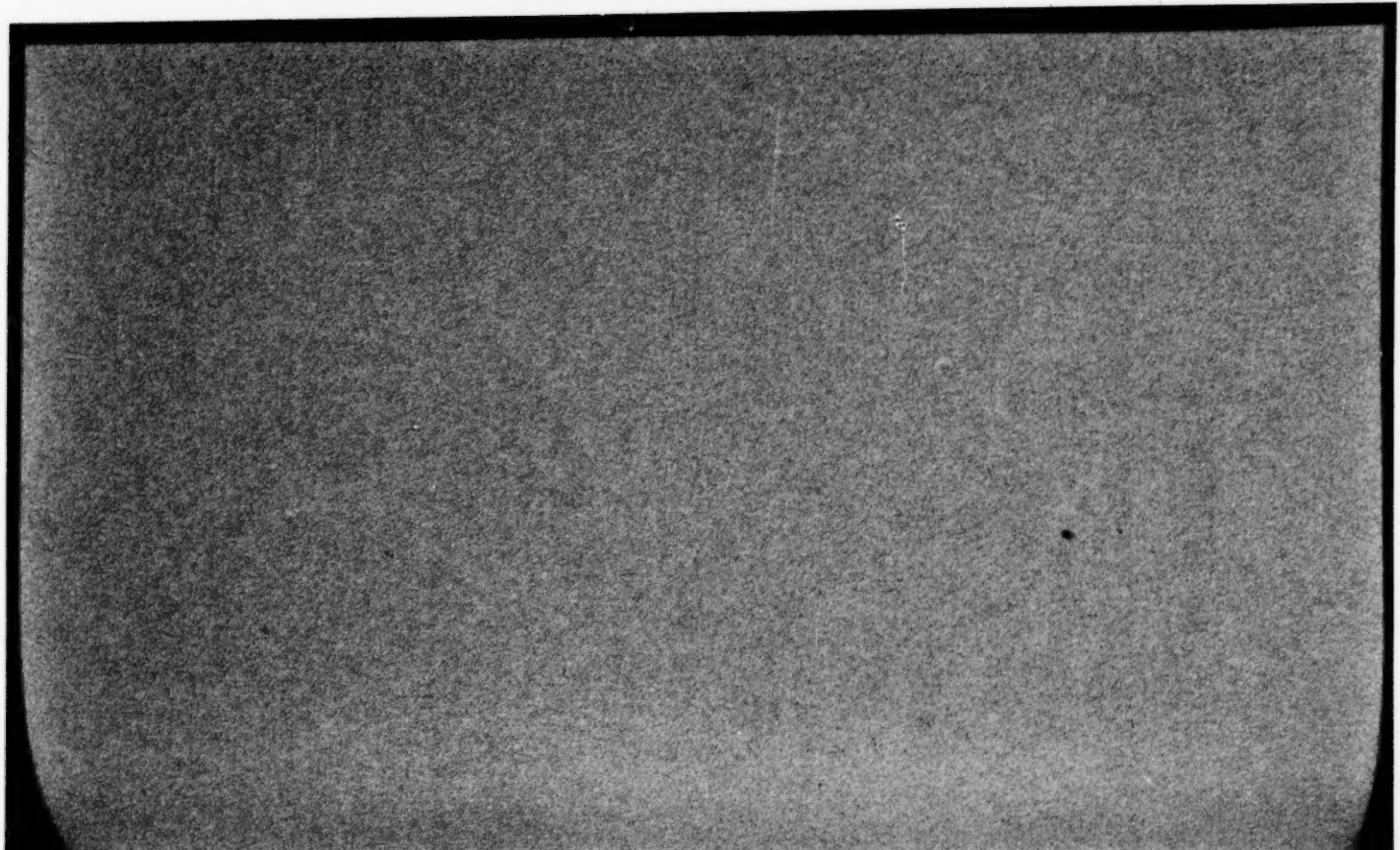
JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS OF THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 4, 1921.

CERTIORARI AND RETURN FILED NOVEMBER 28, 1921.

(27,902)



# (27,962)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1920.

# No. 605.

ARTHUR J. DAHN, PETITIONER,

*vs.*

JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS OF THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 8, 1921.

Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1920, of said Court, Before the Honorable Walter H. Sanborn and the Honorable John E. Carland, Circuit Judges, and the Honorable Jacob Trieber, District Judge.

Attest:

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States*
*Circuit Court of Appeals*
*for the Eighth Circuit.*

Be it remembered that heretofore, to-wit: on the eighteenth day of November, A. D. 1919, a transcript of record, pursuant to a writ of error directed to the District Court of the United States for the Northern District of Iowa, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, and thereafter on the twenty-eighth day of January, A. D. 1920, an additional transcript of record, pursuant to stipulation of parties, was filed in the office of the Clerk of the United States Circuit Court of Appeals, in a certain cause wherein Walker D. Hines, Director General of Railroads of the United States, was Plaintiff in Error, and Arthur J. Dahn was Defendant in Error, which said transcripts as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 THE UNITED STATES OF AMERICA,
*Northern District of Iowa, ss:*

Pleas Before the District Court of the United States in and for the Northern District of Iowa, Eastern Division, Before the Hon. Henry T. Reed, Judge of the United States District Court for Northern District of Iowa.

Law.

No. 167.

ARTHUR J. DAHN, Plaintiff,

vs.

WALKER D. HINES, Director General of Railroads, Defendant.

Be it remembered that on the 22nd day of November, 1918, there was filed in the District Court of the United States for the Northern

District of Iowa, Eastern Division, a petition at law in words and figures as follows:

(*Petition.*)

ARTHUR J. DAHN, Plaintiff,

vs.

WILLIAM G. MCADOO, Director General of Railroads, and ILLINOIS CENTRAL RAILROAD COMPANY, Defendants.

For cause of action, plaintiff states that he is a resident of Dubuque County, in the Northern District of Iowa, is a citizen of the State of Iowa, and that defendants are non-residents of the State of Iowa; that defendant, Illinois Central Railroad Company, is a corporation organized under the laws of the State of Illinois, and is a citizen of that state, and at all times referred to herein was the owner of a railroad operating in the state of Iowa, and maintaining an office in Dubuque, Iowa; that defendant William G. McAdoo is the Director General of Railroads of the United States of America, and is a citizen of the State of New York, and this action is brought against him in said capacity as representing the said Illinois Central Railroad Company; that the amount involved in this case is in excess of the sum of Three Thousand ($3,000) Dollars.

2 Plaintiff further states that on May 29, 1918, he was a railway mail clerk, engaged in the performance of his duties as such, and riding in a mail car composing a part of train No. 11, of defendant, Illinois Central Railroad Company, running over the track of said company, and said train being then operated under the administration of said defendant, William G. McAdoo, as Director General of Railroads as aforesaid. That on said date, and while plaintiff was so engaged, said train was derailed and wrecked by plunging through a bridge composing a part of the roadbed of said defendant, near Aplington, Iowa, and that by reason thereof plaintiff was seriously and permanently injured, as hereinafter more definitely described.

That said wreck and plaintiff's said injury resulting therefrom were due to no negligence on plaintiff's part, but were caused by the negligence of the defendants in the following particulars, to-wit:

1. In constructing and maintaining said bridge in a dangerous and unsafe condition, and without sufficient strength to bear the weight of said train.

2. By reason of the insufficient construction of the concrete portions of said bridge, the concrete not being reinforced in any way, and being of such character as to be liable to become weakened and unsafe by the action of the water upon same, especially in times of flood.

3. In failing to construct said bridge with a sufficient span or arch to form a sufficient waterway to permit the escape of the water which

would and did accumulate and flow along the natural water course under said bridge, by reason of which fact the water was caused to accumulate in a large body above the bridge, forming a force which weakened the bridge and helped to cause the said wreck to occur.

4. In operating said train at an excessive and unsafe rate of speed, under conditions made dangerous by a violent rain storm and flood then raging.

5. By reason of failure to patrol the track at the point where the said wreck occurred, and failure to discover the dangerous conditions and to warn the train crew of same.

And plaintiff further states that by reason of defendants' negligence as heretofore alleged, and the wreck caused thereby,
3 he has suffered serious and permanent injuries; that said injuries consisted in severe and painful burns along his right side and arm, in injury to his back, and in fracture of the processes of the [lumber] vertebræ; that said injuries rendered plaintiff unfit for work, and unable to perform physical labor of any kind; that he has suffered and still suffers from great pain, and from sleeplessness and nervousness, and will continue so to suffer for a long period of time; that his said injuries are of such character to be permanent, and permanently to incapacitate him for labor, and seriously and permanently to depreciate his earning capacity; that he has incurred doctors' bills and drug bills in the sum of $35.00 and that in said wreck his personal effects were lost and destroyed to the value of about $60.00.

That by reason of the physical injuries herein alleged, and the pain and suffering caused thereby, and to be caused thereby, and the expense and trouble which plaintiff has been put to by reason thereof, and the loss of personal effects as above stated, plaintiff has been damaged in the sum of Twenty Thousand ($20,000.00) Dollars, which sum is due him from defendants, and is wholly unpaid.

Wherefore, plaintiff demands judgment against defendants in the sum of Twenty Thousand ($20,000.00) Dollars, and costs of this action.

HURD, LENEHAN, SMITH & O'CONNOR,
*Attorneys for Plaintiff.*

(*Return of Marshal on Summons, etc.*)

A summons issued by the Clerk of said Court on the 22nd day of November, 1918, in the ordinary form, demanding $20,000 damages against the defendants for personal injury was served, and the return of service thereon was as follows:

This writ came into my hands for service on the 22nd day of November, A. D. 1918, and I served the same on the within named William G. McAdoo, Director General of Railroads and Illinois Central Railroad Company, defendants, on the 22nd day of November,

1918, by reading the same to L. E. McCabe, Superintendent
4 of said Illinois Central Railroad Company and by delivering
a true copy to him for each of said defendants at Dubuque, in
the County of Dubuque, and State of Iowa.

E. R. MOORE,
*United States Marshal.*
By A. P. HOUSTON,
*Deputy.*

On the 22nd day of November, 1918, Attorneys Hurd, Lenehan, Smith & O'Connor entered their appearance of record in writing in said cause.

(*Motion of Defendants to Dismiss.*)

On the 3rd day of December, 1918, Nelson & Duffy, attorneys at Dubuque, Iowa, and F. H. Helsell and C. A. Helsell, of the firm of Helsell & Helsell, entered their appearance for William G. McAdoo, Director General of Railroads and the Illinois Central Railroad Company, and filed as friends of the Court their motion in said cause in behalf of the Director General and Illinois Central Railroad Company in words and figures as follows:

The defendants in the above entitled action respectfully ask permission to appear as friends of the court and file their motion and submit the same as such as follows:

Division 1.

The Illinois Cenfral Railroad Company asks to be dismissed from said cause for the following reasons:

(*a*) It appears from the petition affirmatively that this suit is brought against William G. McAdoo, Director General of Railroads for the United States and the Illinois Central Railroad Company. That in pursuance with an Act of Congress granting power and the appointment of said William G. McAdoo, Director General of Railroads, under such act and under General Order No. 50 issued by William G. McAdoo, Director General of Railroads, suits are not to be, and cannot be, brought against a railroad company which is operated and controlled and involuntarily taken over by the United States, and under the law in the possession and control of the government of the United States by the said director general. A copy of said General Order No. 50 is attached hereto and made a part hereof from which it is clearly determined that suits are not to be brought against the railroad company as operated and taken over by the Director General of Railroads acting for the United States
5 That said order provides and should be construed to give the right to sue or be sued to the director general alone and not jointly with any other party and by the law the United States has the right to, and did qualify the grant of permission to sue it through its director general of railroads alone and that suits brought since

e first day of January, 1918, must be brought against William G. cAdoo, Director General of Railroads alone and "not otherwise."

(b) Because it affirmatively appears from the petition that the leged accident or injury occurred after December 31, 1917, and at time when the Illinois Central Railroad Company had been seized nder acts of Congress and had been, and ever since has been, op- ated under the control of the director general acting for the United tates as a war measure. That this taking and controlling said rail- ad and operating it since January 1, 1918, has been solely and holly under the control of the United States and such operation, ecause of which plaintiff demands damages, was carried on solely nd wholly by the United States, under its control as provided by ederal law and this suit must be directed wholly against the director general] of railroads and recovery, if at all, must be against the irector general solely and alone.

(c) Because this suit, under the federal law hereinbefore referred , is, if it gives a right of recovery at all, solely and wholly upon a laim against the United States and under the federal compensation tatute 39 Statutes at Large 742, or under the Federal statute 38 Statutes at Large 301, there has been a method provided by the nited States for the adjustment of injuries to its employees, under he Federal Compensation Acts, and Congress having acted upon said ubject, such cases are remedial under said compensation act and ot otherwise and it appearing affirmatively that at the time of the njury, plaintiff was a mail clerk in the performance of his duties as n employee on mail car in the employment of the United States and ith the exclusive benefit given by federal compensation statutes, xclusive remedy has been provided for such damages as are claimed and the plaintiff is not entitled to recover against the Illinois Central Railroad Company.

(d) Because the record shows there is no valid service upon the railroad company because there is no officer or agent of said Illinois Central Railroad Company within this jurisdiction in the employ of said company and in addition to asking dismissal of the railroad company from this suit, said Illinois Central Railroad Com- 6 pany asks that the service of the summons should be quashed and set aside.

(e) Because in this case upon the allegations of the petition this court has no jurisdiction of the cause as against the Illinois Central Railroad Company as the same is brought contrary to condition of General Order No. 50 of which a copy is attached hereto.

(f) Because under the federal acts and orders of the President and of the Director General, it affirmatively appears, that at the time this suit was brought the Illinois Central Railroad Company, under the allegations of the petition, had been seized and was being operated by the United States government and was under the full control of said government operating under the directions, as by law provided,

of William G. McAdoo, Director General of Railroads. That said Illinois Central Railroad, and any railroad so seized by the government and operated as a war measure after the first day of January, 1918, was not the employer of any one connected with the accident as referred to in the petition and was not responsible for the acts of the employees of said government controlling and using said railroad and in case of such seizure by the government the Illinois Central Railroad Company affirmatively appears in fact, under the law, as not responsible for any accident occurring while it has been deprived of control involuntarily and was not in fact using said railroad, operating it or hiring or paying for the employees operating the train on which it is claimed the plaintiff was injured, and because of the foregoing reasons, the allegations of the petition as against the Illinois Central Railroad Company are irrelevant, immaterial and incompetent.

Division II.

William G. McAdoo, Director General of Railroads of the United States joins in and asks the sustaining of the foregoing motion of the Illinois Central Railroad for each and all of the reasons urged therein, this appearance and motion being asked as a friend of the court.

He asks further that the case may be dismissed as to him or that the allegations of the petition be stricken out for the reasons,
7 in addition to those urged in the motion of the Illinois Central Railroad Company, as follows:

1. The court has no jurisdiction of the parties defendant or subject matter alleged in said petition as against William G. McAdoo, Director General of Railroads for the reasons:

(*a*) No sufficient summons or proper service has been made upon him or any officer or agent within the jurisdiction of this court which would give the court jurisdiction of this defendant as sued and in connection with this matter this defendant moves to quash any return made upon any alleged summons on which the plaintiff seeks to have this court assume or maintain jurisdiction.

(*b*) Because it appears that the allegations of the petition are immaterial, irrelevant, redundant and incompetent as suit is brought and service was had against this defendant merely as a representative of the Illinois Central Railroad Company and no service has been had, nor petition filed, against him individually as the Director General of Railroads acting in behalf of the United States.

(*c*) Because under the allegations of the petition no allegations of any cause of action for which recovery [*nay*] be had are set out as against this defendant in any way or under any conditions binding him as director general of railroads of the United States and it appears upon the face of the petition that the allegations as to him

are irrelevant, immaterial, incompetent and do not present any cause of action whatever.

WILLIAM G. McADOO,
*Director General of Railroads of the United States.*
ILLINOIS CENTRAL RAILROAD COMPANY,
By NELSON AND DUFFY AND HELSELL & HELSELL,
*Their Attorneys.*

United States Railroad Administration.

Washington, Oct. 28, 1918.

(General Order No. 50 of William G. McAdoo, Director General of Railroads, October 28, 1918.)

Whereas by the Proclamation dated December 26, 1917 and April 11, 1918, the President took possession and assumed control of systems of transportation and the appurtenances thereof, and appointed the undersigned, William G. McAdoo, Director General of [Railro-ds], and provided in and by said proclamation that "until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Inter-State Commerce Commission and to all statutes * * * but any orders, general or special, hereafter made by said Director shall have paramount authority and be obeyed as such;" and

Whereas the Act of Congress, called the Federal Control Act, approved March 21, 1918, provided that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President;" and

Whereas since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporations:

It Is Therefore Ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the

Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.

9 Subject to the provisions of General Orders numbered 18, 18-A and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceedings may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

The undersigned Director General of Railroads is acting herein by authority of the President for and on behalf of the United States of America, therefore no supersedeas, bond or other security shall be required of the Director General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas, or other process in law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas, or other process, or otherwise in respect of any such cause of action or proceeding.

W. G. McADOO,
*Director General of Railroads.*

(*Motion to Dismiss Petition Sustained as to the Illinois Central Railroad Company and Overruled as to William G. McAdoo, Director General, etc.*)

Thereupon, on the 3 day of December, 1918, the Court sustained said motion and dismissed from said cause the Illinois Central Railroad Company and overruled said motion asking the dismissal of William G. McAdoo, Director General of Railroads, to which ruling the plaintiff and the defendant William G. McAdoo excepted, and exceptions were allowed to each party on the adverse ruling.

10 (*Demurrer to Petition of Defendant William G. McAdoo, Director General of Railroads.*)

Thereupon on the 16th day of December, 1918, the defendant William G. McAdoo, Director General, filed his demurrer in words and figures as follows:

Comes now the above named defendant and demurs to the petition on file in said cause for the reasons that the facts stated therein do not entitle plaintiff to the relief demanded because:

1. It appears upon the face of the petition that this cause was begun in court after the issuance of Order No. 50 of the defendant who was, and is, the Director General of Railroads under the acts of Congress and proclamations of the President and who was at the time of the alleged maturity of the claim for damages, such Director General of Railroads acting in behalf of the United States government, and that said injury for which damages is claimed, or death resulting therefrom, occurred after the 31st day of December, 1917, and that any claim for damages in the petition must be solely and wholly against W. G. McAdoo, Director General of Railroads and upon the face of the petition it appears that the claim of the petitioner is not against the Director General of Railroads acting for the United States but is wholly against W. G. McAdoo, Director General of Railroads acting for and in behalf of the Illinois Central Railroad Company and the petition upon its face shows that it alleges no cause of action against the Illinois Central Railroad Company as the agent. A copy of General Order No. 50 referred to is attached hereto and made a part hereof.

2. Because it is affirmatively pleaded and shown by the petition that the accident referred to happened after the 31st day of December, 1917, and at a time when the railroad referred to in the petition was under the operation, direction and control of the United States through its Director General of Railroads. That by the proclamation of the President of the United States appointing said Director General and defining his duties as provided, he had such power and authority as was therein provided, to make orders which would be of paramount authority. That among the further orders made by the Director General was General Order No. 18 of April 9, 1918, wherein it was ordered that no process mesne or final shall be levied against any property under such federal control. That it has also been ordered that suit shall not be without the approval of the Di-
11 rector General so that the proceeding asked of the court in this case is ineffective, inoperative and useless. That even though a judgment could or might be obtained the same is wholly subject to the consideration, modification or refusal of payment of the Director General and such whole matter is within the control of the Director General. It is not alleged or proved that any submissions of the claims of the plaintiff, prior to the bringing of this suit, or now, has been made to the Director General of Railroads, that final process of execution shall ever be permitted to issue in case judgment is obtained by the plaintiff and plaintiff is asking a wholly ineffective, inoperative and valueless proceeding against the Director General of Railroads which, at the end of the trial, is wholly in the control and judgment of the Director General as to payment and this court should not permit trial and expense and procedure to be indulged in without a refusal on the part of the Director General to act and courts

will not lend themselves to the procedure which is ineffective and without power to compel performance.

3. The defendant specifically shows the court that it affirmatively appears from the petition that the accident occurred upon the railroad formerly operated by the Illinois Central Railroad. That since December 31st, 1917, said railroad, at all times, including the time of the accident, was under the exclusive use and control of the United States acting through its Director General of Railroads. That the Illinois Central Railroad Company was not operating said road but the same had been seized by the government of the United States for war purposes, it being used, controlled, operated and under the entire and exclusive use and operation of the United States as aforesaid but the accident for which damages is claimed, occurred after December 31st, 1917, and this suit was brought after the promulgation of General Order No. 50 in October, 1918. The petition further states that the party because of whose injury damages are claimed, was at the time of the accident, and had been at all times referred to previous thereto, in the direct employment as a direct employee of the United States government acting as a mail clerk in the employ of such government. That by Chapter 458, page 742 of Vol. 39 U. S. Statutes at Large, the government in its governmental capacity by Act of Congress, had assumed charge and determination of the compensation of injured or dead employees, injured or killed while in the service of the government and that provided for the manner, method and amount of compensa-
12 tion which could be recovered for injuries and death of its employees, including mail clerks. That this action is pending, if it is allowable at all, as against the United States acting at the time of the accident through its Director General of Railroads and is in fact a direct claim against the government of the United States, if it amounts to any claim at all legally collectible. That by the enactment and promulgation and making of the law embodied in said chapter, the United States government enacted an exclusive, certain and direct determination of the right of recovery of a mail clerk injured or killed during the time of his employment and that such act excludes any other recovery than in said chapter provided. It appears affirmatively from the petition that this procedure is not within said law or according to its provisions and that act existing in favor of the said mail clerk provides for the only action that can be legally prosecuted for a claim claimed and because of such facts, the same being embodied in federal law of which the court must take judicial notice, the claims presented in this case present no cause of action on which a recovery may be had in this action.

WILLIAM G. McADOO,
*Director General of Railroads,*
By F. H. HELSELL AND
CHAS. A. HELSELL,
*His Attorneys.*

*General Order No. 50.*

United States Railroad Administration.

Washington, Oct. 28, 1918.

Whereas, by the Proclamation dated December 26th, 1917, and April 11, 1918, the President took possession and assumed control of systems of transportation and the appurtenances thereof, and appointed the undersigned, William G. McAdoo, Director General of Railroads, and provided in and by said Proclamation that "until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Inter-State Commerce Commission and to all statutes * * * but any orders, general or special, hereafter made by said Director shall have paramount authority and be obeyed as such;" and

Whereas the Act of Congress, called the Federal Control Act, approved March 21, 1918, provided that "carriers while under Federal control shall be subject to all laws and liabilities as com-
13 mon carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President;" and

Whereas since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporations:

It Is Therefore Ordered, that actions at law, suits in equity, and proceedings hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.

Subject to the provisions of General Orders numbered 18, 18-A and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of

action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substi-
14 tuting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

The undersigned Director General of Railroads is acting herein by authority of the President for and on behalf of the United States of America, therefore no supersedeas, bond or other security shall be required of the Director General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas, or other process in law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas, or other process, or otherwise in respect of any such cause of action or proceeding.

W. G. McADOO,
*Director General of Railroads.*

(*Order Setting Demurrer to Petition for Hearing on April 2, 1919.*)

On application of the plaintiff, on the 25th day of March, 1919, an order was made by Henry T. Reed, Judge of the Court, for a hearing on said defendant's demurrer, as above entitled, on the 2nd day of April, at the regular April term of this court, at Cedar Rapids, Iowa, in words and figures as follows, which order was filed in this Court on the 26th day of March, 1919:

The foregoing motion has been presented to me in chambers and it is hereby ordered that the hearing on defendant's demurrer in the above entitled case be held at Cedar Rapids, Iowa, on the second day of April, 1919, term of this court, which convenes there on April 1, 1919, said hearing to be held at 10 A. M. on Wednesday, April 2, 1919.

Dated at Cresco, Iowa, this 25 day of March, A. D. 1919.

HENRY T. REED,
*Judge.*

(*Opinion of the District Court on Demurrer to Petition.*)

Pursuant to said order, at the date set in said order, the demurrer of the defendant, William G. McAdoo, was heard at Cedar Rapids, Iowa, in open court, and was submitted, and on the 16th day of April, 1919, the Court filed a written memorandum and
15 order, overruling the demurrer of the defendant to the plaintiff in words and figures as follows:

This action was commenced November 22nd, 1918, to recover damages for a personal injury [sustained] by the plaintiff on May

29th, 1918, while employed as a United States railway mail clerk upon the Illinois Central Railroad because of the alleged negligence of the Railroad Company in the construction and maintenance of its track, bridges and roadbed, and the employees operating the train upon which the plaintiff was so employed.

The defendant Railroad Company at the time of such injury had been taken over by the President under the Act of Congress approved August 29th, 1916 (Chap. 418, 39th Stat. p. 645) and was being operated by the Director General of Railroads in the prosecution of the war against the Imperial German Government.

The action was brought originally in this court against the Railroad Company and William G. McAdoo then Director General of railroads, in the manner and as authorized by the statutes of Iowa in suits brought against railroad companies in that state. At the December, 1918, term of this court, the defendants separately appeared and each moved to dismiss the action against him respectively upon the ground, that under General Order No. 50 promulgated by the Director General of Railroads on October 28th, 1918, the action could not rightly be maintained against either the Railroad Company or the Director General of Railroads. The motion was sustained as to the defendant Illinois Central Railroad Company because of said General Order No. 50; but the motion as to the Director General was overruled, and orders were duly entered of record accordingly on December 5th, 1918.

The Director General was granted leave to file a demurrer to the petition within a time stated, should he be so advised; and on December 16th, 1918, filed a demurrer to the petition challenging the right of the plaintiff to maintain the action as against him substantially upon the grounds:

(1) That the action was commenced after the promulgation by Director General McAdoo on October 28th, 1918 of General Order No. 50, and cannot therefore be maintained against either defendant;

(2) That the injury to the plaintiff and damages claimed by him occurred after the 28th day of December, 1917 (when
16 the transportation systems of the United States were taken over by the President, and the operation thereof placed under the control of the Director General of Railroads) and the Director General is not liable for any damages suffered by the plaintiff thereafter;

(3) That neither the Director General nor the Government is in any event liable for injuries received by the plaintiff (who the petition shows was a railway mail clerk upon the Illinois Central Railroad in the performance of his duties as such clerk) for by the Act of Congress approved September 7th, 1916 (Chap. 458, 39 Stat. p. 472) providing "compensation for employees of the United States suffering injuries while in the performance of their duties," excludes any other recovery or method of recovery by civil employees of the United States for injuries suffered by them in the perform-

ance of their duties, than in said act provided; and the claim presented by the plaintiff in this action shows no cause of action upon which a recovery may be had against the Director General of Railroads, or against the Government.

Messrs. Helsell & Helsell and Mr. Fletcher, for the Director General.

Messrs. Hurd, Lenehan, Smith & O'Connor for the plaintiff.

REED, *District Judge:*

The first ground of the demurrer is substantially a repetition of the motions to dismiss the action against both defendants, and in view of the ruling heretofore made on those motions, needs but little consideration.

By the Act of Congress approved August 29th, 1916, it is provided:

"The President in time of war is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

(Chap. 418, 39 Stat. p. 645.)

17 Pursuant to that authority the President on December 26th, 1917, issued his proclamation, in which among other things, it is recited:

"It is hereby directed that the possession, control, operation, and utilization of such transportation systems, hereby by me undertaken, shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said Director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers, and employees of said systems of transportation. Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies.

Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission, and to all statutes and orders of regulating commissions of the various states in which said systems or any part thereof may be situated. But any orders, gen-

eral or special, hereafter made by said director shall have paramount authority and be obeyed as such."

By the Act of Congress approved March 21st, 1918, called the Federal Control Act, it is provided in Section 10 thereof:

"Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal con-
18 trol of such carrier. * * * But no process, mesne or final, shall be levied against any property under such Federal control." (40th Stat. Chap. 25 p. 451.)

On October 28th, 1918, pursuant to such Act of Congress and the proclamation of the President, the Director General promulgated General Order No. 50, which so far as deemed material, is as follows:

"Whereas since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising under Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the Director General of railroads and not against said corporations:

It is therefore ordered, that actions of law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad system of transportation by the Director General of Railroads, which action, suit or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; * * *

Subject to the provisions of General Orders numbered 18, 18-A and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Rail-

roads, the railroad or other carriers in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

19 It seems entirely clear, therefore, that under the Acts of Congress referred to the President was fully empowered in time of war to take possession and assume control of the entire system or systems of transportation of the United States through the Secretary of War and place them under the control of a Director General of Railroads to manage and operate the same during the period for which possession of them was taken, and that actions or claims for damages arising out of the operation and control of such systems may be brought and prosecuted to final judgment against the Director General under the orders promulgated by him therefor. Of course the possession and control of the property of the railway systems so placed in the possession, and under the control of, the Director General may not be disturbed or interfered with under judgment or other proceedings against him; but as the judgment, or other process of the court that may be rendered against him, is and will remain under its control it will not permit its process to interfere with his custody or control of such property.

The reasons assigned in General Order No. 50 that "suits are being brought and judgments and decrees rendered against carrier corporations on causes of action arising during Federal control for which the said carriers are not responsible", is a sufficient and very proper precaution for requiring that such actions and proceedings should be brought against the Director General that he may properly defend against such actions, and not entrust their defense to the carrier corporations.

This ground of the demurrer is, therefore overruled.

It is next urged in support of the demurrer that plaintiff, a railway mail clerk, at the time of his alleged injury can recover for that injury if at all, only under the "Federal Employees [Compansation] Act" of Congress approved September 7th 1916 (39th Stat. Chap. 458 p. 762) hereinbefore referred to.

The petition alleges that the plaintiff was an employee of the Government in the performance of his duties as a mail clerk upon the Illinois Central Railroad in Iowa at the time of the accident which resulted in the injuries of which he complains. The Congress in the act to which reference is above made, has imposed upon the United States a liability for injuries to its employees when in the performance of their duties, except under the conditions prescribed in the act; and it may be that the Congress might have re-

quired the injured employee to seek redress for such disability
20 or injury exclusively from the United States, and in the manner provided in the act. New York Central R. R. vs. White, 243 U. S. 188, and cases cited; and New York Central R. R. vs. Winfield, 244 U. S. 147, 150. But be this as it may, the Congress has not done so. By Section one of that act it is provided:

"That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty", except under the conditions prescribed in the act.

Other sections of the act provide in detail the method and procedure by which the injured employee may recover from the United States the compensation therein provided for such injury. That a mail clerk employed by the United States upon a mail car used in the carriage of mails upon railroads is an employee of the United States within the meaning of this act, is not doubted, nor is it disputed, and when such an employee is disabled or killed in the performance of his duties and seeks to recover from the United States the compensation so provided, it is obvious that he must proceed in the manner provided by this act. But in no part of the act is it directly or by reasonable implication provided that the injured employee or his legal representatives shall be limited to the amount of compensation so provided in this act as against a wrongdoer who by some negligent or other wrongful act, has caused the death or disability of the injured employee, and to so prohibit would be to amend the act, which the Court will not do.

This ground of the demurrer is also overruled, and it is accordingly so ordered.

To each and all of said findings and rulings and order the defendant duly at the time excepted, and said exceptions were allowed.

*(Amendment to Petition.)*

On April 18th, 1919, the plaintiff filed in this Court his amendment to petition in words and figures as follows:

For amendment to his petition heretofore filed, plaintiff states:

That by reason of defendant's negligence as alleged in said petition and the wreck caused thereby, he has suffered serious
21 and permanent injuries in addition to those alleged in his said petition, said additional injuries consisting of fractures of both sacro-iliac joints which injuries render plaintiff unfit for work and unable to perform physical labor of any kind and that by reason thereof plaintiff has suffered and still suffers great pain, sleeplessness and nervousness and that said injuries are of such character [—] to be permanent and permanently to incapacitate plaintiff for labor and seriously and permanently disable him and destroy his earning capacity.

Wherefore, plaintiff demands judgment against defendant by reason of the facts stated in his petition and in this amendment in the sum of $30,000.00 and costs in this action.

HURD, LENEHAN, SMITH & O'CONNOR,
*Attorneys for Plaintiff.*

(*Answer of William G. McAdoo, Director General of Railroads.*)

On the 23rd day of April, 1919, the defendant filed an answer at law in words and figures as follows:

Comes now William G. McAdoo, formerly Director General of Railroads under the Railroad Administration of the United States, and for his answer shows the Court that the Illinois Central Railroad Company, co-defendant, has been dismissed by order of court from this case, and he shows the Court in his behalf that he has recently and prior to the hearing in this cause, sent in his resignation, which has been accepted, and that he is no longer Director General of Railroads under the United States Railroad Administration; and he says that W. D. Hines has been, and is, appointed Director General; that this action was against him solely in an official capacity, and not against him personally, and that personally and individually he has no interest in said cause, and has never had except in connection with his official duties, and urges that he be dismissed from said cause.

WILLIAM G. McADOO,
*Director General of Railroads,*
By NELSON & DUFFY AND
HELSELL & HELSELL,
*His Attorneys.*

22 (*Answer of Director General of Railroads.*)

And on April 23rd, 1919, the Director General of Railroads of the United States filed his answer in this Court of record in words and figures as follows:

Comes now the Director General of Railroads of the United States and for his answer to the petition on file or as amended says:

Division I.

That Wm. G. McAdoo, Director General of Railroads is sued in this cause merely as an official appointed and under the order of the President of the United States. That prior to the trial of this cause Wm. G. McAdoo resigned and it is claimed that no right of action is presented by the petition as against him individually or personally and it is asked that he be dismissed without cost, individually. The Director General further says that Walker D. Hines

has been appointed Director General of Railroads and is now qualified and acting as such. That as to the residence of the plaintiff or citizenship the defendant has neither knoweldge nor information sufficient to form a belief. The defendant admits that at the time stated the plaintiff was a railway mail clerk engaged in the performance of his duties, employed by and acting for the United States as such, riding in a mail car at or about the place stated in the petition. That the train in which he was riding was derailed by plunging through a bridge or off from a bridge at or near the place stated, but as to the extent of his injuries, this defendant has neither knowledge nor information sufficient to form a belief and therefore asks proof of the same. Defendant denies each and every allegation as to negligence on the part of the defendant and each and every other material allegation of plaintiff's petition not in this answer admitted.

Division II.

Further answering, the Director General of Railroads says: He admits the occurrence of a derailment of the train on which plaintiff was riding at or about the time and place as stated in the petition and alleges that said accident occurred without fault or negligence on the part of this defendant and was not due to human causes but by what is legally known as an act of God, in that the breaking of the track or bridge on account of which the accident occurred was due to a violent cloud burst which caused an immense and ungovernable amount of water to accumulate and be thrown against
23 said bridge, undermining the same and causing the disaster. That such unexpected and unprecedented condition and cause could not have been anticipated by human caution and that any injury suffered or complained of was due to such act of God and not to any negligence on the part of the defendant.

Division III.

Defendant respectfully shows the court that by the Act of Congress approved August 29, 1916, the President of the United States was empowered by law to take possession and assume control of the systems of transportation of the United States. That by his proclamation of December 26, 1917, the President of the United States did assume the use, possession and control of the systems of transportation aforesaid, including the entire property of the Illinois Central Railroad Company upon which the train is referred to in the petition was running. That by the Act of Congress approved March 21, 1918, it was determined and declared that in pursuance with the act granting him power aforesaid, the President had in fact taken over the use, control, possession and operation of the railroads of the United States and said act usually called the Federal Control Act determined that the railroads, including the road mentioned, were then under the control of the Director General acting as the agent of the President of the United States and by the act of Congress the

President was granted authority in the performance of his services in connection with said control, to perform said acts through such agents as he might employ or appoint and that under and by virtue of the acts of Congress and the proclamation of the President of the United States ever since January 1, 1918, the Illinois Central Railroad Company has been under the control, use, possession and operation of the United States Government acting through Congress, the President and the Director General. That such use, control, possession and operation of said railroad since said date have been seized by the government in the manner aforesaid and the property referred to in the petition belonging to or leased by the Illinois Central Railroad Company has been in the exclusive use, possession, control and operation of the government of the United States acting through its agent and such use has been exclusive and any right of action, if any there be, must be in this case against the government of the United States acting through its agents as aforesaid. It is urged defensively and inhibition that no right of action has been provided for the maintenance of this suit against the Rail-
24 road Administration or against the government of the United States nor has any act of Congress empowered the President or his agent to create a right of action against the government or the Director General

Division IV.

Further answering, this defendant makes the last above division a part hereof, all except the last sentence therein, as fully as though written out herein again in full and says that the accident referred to in the petition arose under the conditions named as aforesaid, when the possession, use, control and operation of said railroad were used by the Government of the United States acting as aforesaid. That the Illinois Central Railroad Company or any other person other than the employees of the Government of the United States had no use, possession, control or operation of said road. That as stated in the petition and as a fact, the plaintiff at the time of the accident was in the direct employ of the United States government acting as a mail clerk in the performance of his duty due to the United States. That by act of Congress Chapter 458, 39 Statutes at Large, page 472 approved by Congress Sept. 7, 1916, there was provided compensation for employees of the United States suffering injuries or death while in the due performance of their duty, determining the method of procedure in obtaining such compensation from the United States, the amount of such compensation and providing for the assignment of any compensation received from others, if any should be received, for the negligent act of others causing such injury to the United States. That this case is pending to recover compensation from the United States. That no federal law exists allowing recovery from the United States except as provided in this act and to recover compensation from the United States acting through its Railroad Administration for an accident occurring while the use, control, possession and operation of the rail-

ad were exclusively in the control of the United States is provided r in no part of the act of March 21, 1918 or by any other act of ongress directly or by reason of implication and therefore this tion must be abated.

Division V.

Further answering the defendant makes the last above division part hereof as fully as though written herein, leaving out the last ords "and therefore this action must be abated," and says further. hat under the act for compensation for the employees of the United States aforesaid, this plaintiff has made application in the manner provided by said act for compensation under said act and this defendant is informed and believes and charges hat such application has been affirmatively acted upon and said em- loyee has the benefit of all the provisions of said compensation act f the United States and that having elected to recover under and y virtue of said Chapter 458, 39 Statutes at Large approved Sep- ember 7, 1916, that plaintiff or anyone claiming for him must be eld to have elected as to his right of recovery and may not now ecover in this action.

Division VI.

Further answering this defendant says. He makes the last fore- going division a part of this division as though fully written out herein in full and says further. That said compensation act provid- ing for the payment of employees of the United States, provides for the payment of compensation regardless of negligence and by no part of the act is it directly or by implication provided that any other recovery can be had against the Government of the United States and by no other act of Congress is any other remedy pro- vided under which plaintiff may recover than under said compensa- tion act of the federal government and by the terms of said act if any recovery is had in this case in favor of the plaintiff, it must be a recovery from the United States government and from the money of the United States and it is not provided by law directly or by impli- cation that a recovery can be had from the United States from money which must be paid back to the United States under the conditions as aforesaid herein related.

Wherefore the defendant asks to be dismissed at plaintiff's costs.

DIRECTOR GENERAL OF RAILROADS,
By NELSON & DUFFY AND
F. H. HELSELL AND
C. A. HELSELL,
*His Attorneys.*

(*Amendment to Answer of Director General of Railroads.*)

And on April 28th, 1919, the defendant filed an amendment to Division 4 of his answer in words and figures as follows:

Comes now the defendant in the above-entitled action and asks leave of Court to amend Division Four of his Answer now on file, by striking out all after the words "injury to the United States"
26 on the fourth page of said Division, and inserting in lieu thereof, the following: That in this cause, plaintiff seeks to recover against the Government of the United States and not otherwise, for an accident occurring while the use, control, possession, and operation of the railroads were exclusively in the United States, and the said alleged injuries of the plaintiff, if any, were received by him when in the discharge of his duties as a mail clerk of the United States, within the terms of the acts governing such employment, and not otherwise, and this action is merely to recover alleged damages received while so employed.

Wherefore defendant claims that this action must be abated.

DIRECTOR GENERAL OF RAILROADS,
By NELSON & DUFFY AND HELSELL & HELSELL,
*His Attorneys.*

*(Demurrer to Answer of Director General of Railroads.)*

On the 30th day of April, 1919, the plaintiff filed a demurrer to the answers of the Director General in words and figures as follows:

Comes now plaintiff and demurs to Division III of defendant's answer for the reason that the facts alleged in said Division III do not constitute any defense to plaintiff's cause of action, it being expressly provided by Section 10 of the Act of Congress of March 21, 1918, that carriers, while under Federal control, shall continue to be subject to all laws and liabilities as common carriers arising under State or Federal laws and that actions at law may be brought by and against such carriers and judgments rendered and that in any such action the carrier shall not defend upon the ground that it is an instrumentality or agency of the Federal Government.

II.

Plaintiff demurs to Division IV of the Answer and to the amendment thereto upon the following grounds, to wit:

1. For the reason stated in the first ground of this demurrer which was directed to Division III of the Answer.

2. For the reason that it affirmatively appears this action is not brought against the United States or against the government thereof.

27 3. For the reason that under the Act of Congress cited in said Division IV, providing for compensation of employees of the United States, it is expressly provided that the injured employee may maintain an action as is done in this case.

4. For the reason that said Act of Congress, providing for compensation for employees of the United States, is not exclusive and does not purport to be and does not prevent plaintiff from maintaining cause of action against the defendant, who by its negligence caused him his injury.

5. For the reason that the facts stated in said Division IV and the Amendment thereto constitute no defense to plaintiff's cause of action.

III.

Plaintiff demurs to Division V of defendant's Answer for the following reasons, to wit:

1. Upon the grounds stated in the two preceding divisions of this demurrer as applied to Divisions III and IV of said Answer.

2. For the reason that even if it be true that plaintiff has been paid compensation under the Act to Provide Compensation for Employees of the United States, such fact does not constitute any defense to this action, said act not purporting to furnish an exclusive remedy to plaintiff but on the contrary, expressly providing for the maintenance of an action of this character.

3. For the reason that the facts stated in said Division V constitute no defense to plaintiff's cause of action.

IV.

Plaintiff demurs to Division VI of defendant's Answer on the following grounds, to wit:

1. Upon the grounds stated in the preceding divisions of this demurrer which applied to former divisions of the Answer.

2. For the reason that the facts alleged in said Division VI constitute no defense to plaintiff's cause of action, it not appearing that this is an action against the government of the United States or that this is an action to recover compensation from said government but that it is an action at law for the recovery of damages for injuries caused to plaintiff by the negligence of defendant and is such
28 an action as may be maintained under Section 10 of the Act of Congress of March 21, 1918.

HURD, LENEHAN,
SMITH & O'CONNOR,
*Attorneys for Plaintiff.*

(*Memorandum Opinion of the District Court on Demurrer to Counts 3, 4, 5, and 6 of Answer of Director General of Railroads.*)

On the 2nd day of May, 1919, the Court filed his memorandum and ruling on the plaintiff's demurrer to Counts 3, 4, 5 and 6 of the defendant's answer in words and figures as follows:

After the order of April 16, 1919, overruling the demurrer of the Director General to the petition, that defendant answered the petition in six counts or divisions in which he sets up in counts 3, 4, 5 and 6 substantially the same grounds set forth in his demurrer to the petition, in which he again urges that under the Federal Control Act of March 21, 1918, suits cannot rightly be maintained against the Director General of Railroads for the reason that such a suit would in effect be an action against the United States, which is not permissible in any case, unless by the consent of the Government, which consent it is claimed is not given either by the Federal Control Act or any other Act of Congress, proclamation or order of the President.

This it seems to me is a misconception of the Act of Congress approved August 29, 1916 (39 Stat. ch. 418, p. 635) authorizing the President in time of war, to take possession and assume control of the transportation systems of the United States and utilize the same to the exclusion as far as may be necessary of all other traffic thereon for the transportation of troops, war materials, equipment, and such other purposes connected with the emergency which brought the United States into the war with the Imperial German Government, and the proclamation of the President taking over such transportation systems through the Secretary of War and placing them under the control of the Director General of Railroads to manage and operate the same.

That the Congress in time of war, which then existed, had full power to confer such authority upon the President can hardly
29 be doubted, and by conferring it upon the President the Congress assumed as an obligation of the United States to compensate the owners of such systems for so taking possession and control thereof in defense of the Government in the war thrust upon us by the German Government, and under the proclamation of the President the Director General is authorized to perform the duties imposed upon him and to such extent as he may determine through the boards of directors and other officers and employees of such railway transportation systems as the Director General shall from time to time by general or special order authorize, and providing that the boards of directors, officers and employees of the transportation systems shall continue them in operation in the usual and ordinary manner of the business of common carriers.

And by the Federal Control Act it is provided in Sec. 10 thereof, "that carriers while under Federal control, shall be subject to all laws and liabilities as common carriers whether arising under state, Federal laws, or at common law, except in so far as may be inconsistent with the provisions of that Act or any other Act applicable to such Federal Control, or with any order of the President. * * *"

On October 28, 1918, pursuant to such Act and proclamation of the President, the Director General promulgated General Order No. 50, which among other things provides: "It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to the per-

son, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, * * * shall be brought against the Director General of Railroads alone and not otherwise." The Director General is therefore authorized by this Act of Congress and proclamation of the President to promulgate general and special orders for the control and management of the railroads, which have the force and effect of law and are of paramount authority; and by this declaration of Congress and the General Orders of the Director General, the Government has taken possession and control of the transportation systems, and has become obligated to them for their rental value or use in the prosecution of the war, and has power to compensate them for such use; and as the Director General by General Order No. 50 directs that actions at law, suits in equity, and other proceedings based on contract binding upon him, or claims for death or injury to the person, or for loss and damage to property, shall be brought against him and not otherwise; the Congress through such officers has assumed complete control of such transportation systems, provided for the manner they shall be compensated and paid for the use of their respective systems, and they shall be liable to suits and other liabilities during Federal Control, and that suits shall be brought against the Director General alone, and has thus consented that suits may be brought against the Director General of Railroads (if consent is necessary, which I do not intimate that it was or is).

If judgment shall be recovered against the Director General no process shall be issued upon such judgment that will interfere with the possession of the property or roads under his custody and control, but the Director General may provide for the payment of such judgment from the income or other funds under his control, or the Congress may otherwise provide for the payment thereof as it may see fit.

The demurrer of the plaintiff to Counts 3, 4, 5 and 6 of defendant's answer and each thereof is sustained, to which ruling the defendant excepts.

*(Amendment to Answer.)*

On the 5th day of May, 1919, the defendant asked leave to file an amendment to his answers, which was denied, said Amendment being, in words and figures as follows:

Comes now the defendant in the above-entitled cause and as an amendment to his Answer, asking leave of Court to file the same, says:

That at the time of the alleged accident to the plaintiff, the said plaintiff was in the direct employment of the government of the United States, acting as a mail clerk upon the train referred to in the Petition, in the due performance of his duties in such employment.

That at said time, the United States, acting through the President of the United States and through the Director General of Railroads

of the Untied States, had prior thereto, and at said time, taken the possession, use, control and operation of the railroad on which said train was running, and of the said train, and said train was
31 being operated by the employees of the government of the United States in its railroad administration, and not otherwise.

That said control, use, possession and operation was under and by virtue of the act of Congress of August, 1916, and subsequent acts of Congress as ordered, and circulars of the Director General of Railroads of the United States as then existing, and not otherwise.

That by the act of September 7th, 1916, being the act having reference to the compensation of government employees in the employ of the government of the United States, and under the terms thereof, as an employee of the United States, the plaintiff was entitled for his injuries to recover from the United States, the compensation provided for in said act, and shortly after said accident and his alleged injury, he did apply to the compensation committee having charge of the enforcement of said act, for compensation as an employee of the United States.

That by the terms of said act it was provided that the United States should pay to the plaintiff, or any person injured, while in its employ, the sums provided for in said act and said sums were due and payable whether or not the injury was caused by any negligence, or was free from negligence, and under said act and in conformance with the application of the plaintiff, his said application was approved and he was allowed, and prior to the beginning of this cause had been paid, a sum not accurately known to the defendant in compensation of his alleged claims because of his alleged injury, and this defendant says that he is being sued in this cause for an alleged tort, and that he is entitled to have the amount determined which the plaintiff has received under said compensatory act, and asks that the same may be determined and also the amount which it has been determined he is entitled and will receive under said act of Congress for compensation from the government of the United States, and asks that said amount be determined and that any verdict whatever in this cause, which may or can be allowed in said case, be decreased by the amount that it is determined by the Court the plaintiff has received, or is to receive, from the government of the United States under the compensation act.

DIRECTOR GENERAL OF RAILROADS,
By NELSON & DUFFY AND F. H. HELSELL,
*His Attorneys.*

32 *(Order Overruling Demurrer to Petition of William G. McAdoo, Director General of Railroads.)*

On this 16th day of April 1919 this case again comes before the Court upon demurrer to petition heretofore filed by Wm. G. McAdoo, Director General of Railroads, defendant herein, and the said demur-

rer having been heretofore fully submitted to the Court and by the Court taken under advisement, and said demurrer having been fully considered by the Court; it is

Ordered that said demurrer be and is hereby overruled as to each and every ground thereof.

To which ruling the defendant Director General of Railroads duly excepts.

(*Walker D. Hines, Director General of Railroads Substituted in Lieu of William G. McAdoo; Demurrer of Plaintiff to Counts* 3, 4, 5, *and* 6 *of Answer of Director General of Railroads Sustained; Jury Impaneled; Trial May* 2, 1919.)

On this 2nd day of May, 1919, this cause again comes before the Court in Open Session, plaintiff appearing by Hurd, Lenehan, Smith & O'Connor, his attorneys, and defendant appearing by Helsell & Helsell and Nelson & Duffy, his attorneys; thereupon by consent of parties,

It is Ordered by the Court that the name of Walker D. Hines, present Director General of Railroads be and is hereby substituted in lieu of the name of William G. McAdoo, former Director General of Railroads, who was named as defendant in the petition herein:

It is further Ordered by the Court that the Demurrer of plaintiff to counts three (3) four (4) five (5) and six (6) of the Answer and each thereof, be sustained and defendant thereupon excepts to the ruling upon each of the Counts to which the Demurrer was submitted;

Whereupon both parties stating by his attorney he is ready for trial, the Court directs the Clerk to call a Jury to try said
33 case, thereupon there came twelve good and lawful men, citizens of the District, to-wit:

H. D. Wells, Postville;
E. M. Whitney, Lamont;
John Huilman, Bellevue;
Eugene Anderson, Dubuque;
Leo Butt, Dubuque;
James Berry, Wellsburg;
A. Carter, Fayette;
Frank Mathes, Marengo;
Ed. Schmidt, Dewar;
Fred Buck, Tipton;
Nelson Wyant, Marengo;
Geo. Ambuehl, Monticello,

who were duly impaneled and sworn to well and truly try the issues herein joined and a true verdict give according to the evidence and the instructions given them by the court; thereupon counsel for the parties make their opening statements to the jury, at the close of [*of*] which the plaintiff proceeds to introduce testimony in his behalf the hearing of which testimony was continued until the hour of adjournment of Court for the day when the further hearing was postponed until 9.30 a. m. tomorrow, the Court first admonishing the Jury to refrain from talking among themselves, about the issues in the case, or talking with other parties regarding the case, during this and all subsequent adjournments of Court during the progress of the trial thereof.

(*Trial, May* 3, 1919.)

Now this 3rd day of May, 1919, this cause again comes before the Court in progress of trial thereof, the jury and counsel for parties all being present as heretofore; whereupon the plaintiff resumes the introduction of testimony in his behalf,—the hearing of the said testimony was continued until time for adjournment of Court for the day when further hearing was postponed until 9.30 a. m. Monday May 5, 1919, the Court first admonishing the Jury as heretofore.

(*Trial May* 5, 1919; *Application of Defendant for Leave to File an Amendment to His Answer Denied.*)

Now on this 5th day of May, 1919, this cause comes before the Court in progress of the trial, the jury and counsel for parties all being present as heretofore, and the plaintiff resumes the introduction of testimony in his behalf, the hearing of which testimony was continued until hour of adjournment of Court for the day when further hearing was postponed until 9.30 a. m., tomorrow the Court first admonishing the jury as heretofore;

34 It is further ordered by the Court that the application made by defendant, before adjournment for noon recess, asking leave to file an amendment to his answer, be and the same is denied; To which ruling on the said application the defendant duly excepts.

(*Trial, May* 6, 1919.)

On this 6th day of May 1919 this cause again comes before the Court in progress of the trial thereof the Jury and counsel for the parties all being present as heretofore; thereupon the hearing of the testimony on behalf of plaintiff is resumed and continued until completed and plaintiff rests, and asks permission to introduce testimony as to attempted service of subpœna upon witness Dr. J. W. Roundtree, tomorrow morning, which leave is granted.

Thereupon the counsel for the defendant moves the Court for an order requiring the plaintiff Arthur J. Dahn, to submit to a physical examination by two reputable physicians to be named by the defendant and two reputable physicians to be named by the plaintiff; the said motion is argued to the court and the argument not being completed at the hour of adjournment, the further hearing in the case is postponed until 9.30 a. m. tomorrow, the Court first admonishing the Jury as heretofore.

(*Trial, May* 7, 1919; *Defendant's Application for an Order Requiring the Plaintiff to Submit to a Physical Examination Denied.*)

On this 7th day of May, 1919, this case again comes before the Court in the progress of the trial thereof, jury and counsel for parties

all being present as heretofore, thereupon further arguments of counsel are had upon defendant's application for an order requiring the plaintiff to submit to a physical examination by physicians, and at the conclusion thereof the application is denied, to which ruling the defendant duly excepts; thereupon defendant proceeds to introduce testimony in his behalf the hearing of which was continued until the hour of adjournment of court for the day, when further hearing was postponed until 9.30 a. m. tomorrow, the Court first admonishing the jury as heretofore.

35 (*Trial, May* 8, 1919.)

On this 8th day of May, 1919, the cause again comes before the Court in progress of the trial thereof, jury and counsel for the parties all being present as heretofore, thereupon the hearing of testimony on part of defendant was resumed, and continued until the hour of adjournment of Court for the day when the further hearing was postponed until 9:30 A. M. tomorrow morning, the Court first admonishing the jury as heretofore.

(*Trial, May* 9, 1919.)

On this 9th day of May, 1919, this cause again comes before the Court in progress of trial jury and counsel for the parties all being present as heretofore; whereupon the defendant states in open Court that he has closed his case, and the plaintiff thereupon proceeds to introduce testimony in rebuttal; at the conclusion of which rebuttal testimony both parties rest; the closing arguments of counsel for both parties are presented to the jury, at the conclusion of which the Court instructs the jury in the law applicable to the case, and the jury retires in charge of a sworn bailiff to consider their verdict, the deliberation of the jury not being completed at the hour of adjournment of the Court, Court was adjourned until 9:30 A. M. tomorrow.

(*Trial and Verdict, May* 10, 1919.)

On the 10th day of May 1919, the jury in the above entitled cause having reached a verdict, state they are ready to report, they are brought into Court and in the presence of Counsel for both parties state they have reached a conclusion and deliver the following verdict:

UNITED STATES OF AMERICA,
*Northern District of Iowa,*
*Eastern Division, at Dubuque:*

ARTHUR J. DAHN, Plaintiff,

vs.

WALKER D. HINES, as Director General of Railroads, Defendant.

*Verdict.*

We, the jury, find for the plaintiff and assess his damages at $7,500.

H. D. WEBB,
*Foreman.*"

36 Which verdict is filed by the Clerk, and the defendant by his counsel duly excepts to the said verdict.

It is further ordered by the Court that the defendant have 45 days in which to file motion for new trial.

(*Order of Submission of Motion in Arrest of Judgment and Motion for New Trial.*)

On this 15th day of July 1919, this cause comes before the Court in Open Session, plaintiff appearing by Hurd, Lenehan, Smith & O'Connor, his attorneys, and defendant appearing by Helsell & Helsell, his attorneys, thereupon defendant's motion in arrest of Judgment and for a New Trial is submitted to the Court, and after hearing the arguments of counsel for both parties upon said motion, the Court takes the same under advisement.

(*Motion in Arrest of Judgment and Motion for New Trial Overruled; Judgment, August* 1, 1919.)

This cause was heretofore submitted to the Court upon Defendant's Motion in arrest of Judgment and for a new trial, plaintiff having appeared by Hurd, Lenehan, Smith & O'Connor, his attorneys, and defendant by Helsell & Helsell, his attorneys, and the matter having been fully submitted and duly considered by the Court;

It is Ordered by the Court that the Motion in Arrest of Judgment and for a New Trial is overruled in each and every particular, and it is further,

Ordered by the Court that the plaintiff Arthur J. Dahn, have and recover of and from the defendant Walker D. Hines, Director General of Railroads, judgment in the sum of Seven Thousand Five Hundred dollars ($7,500.00) with interest at 6% per annum from the 10th day of May, 1919, upon which date the verdict was returned by the Jury, together with costs of this proceeding to be taxed by the Clerk;

To which ruling and entry of judgment the defendant excepts.

It is further ordered by the Court that no execution shall issue upon the above entered judgment for the seizure or sale of any property of the Illinois Central Railroad Company, in the custody of
37 the Director General of Railroads, without his consent or permission.

It is further ordered by the Court that defendant have until September 15, 1919, in which to settle and file a bill of exceptions and procure supersedeas, if he desires to prosecute a writ of error without bond.

Dated August 1, 1919.

(*Order Extending Time for Filing Bill of Exceptions.*)

In the above entitled cause it is ordered that the time for settling and filing the bill of exceptions is extended until October 1, 1919.

Dated September 11, 1919.

HENRY T. REED,
*Judge.*

(BILL OF EXCEPTIONS.)

Before the Honorable Henry T. Reed, District Judge.

Hurd, Lenehan, Smith & O'Connor, Attorneys for Plaintiff.
Nelson & Duffy, and Helsell & Helsell, (F. H. Helsell and C. A. Helsell) Attorneys for defendants.

(*Stipulation as to Bill of Exceptions.*)

It is stipulated and agreed that the within contains a correct bill of exceptions, correctly showing the record of the trial in the above entitled cause, and the same is satisfactory to counsel to be signed by the trial judge.

HURD, LENEHAN, SMITH &
O'CONNOR,
*Attorneys for Plaintiff.*
NELSON & DUFFY AND
F. H. HELSELL &
CHAS. A. HELSELL,
*Attorneys for Director General of Railroads.*

W. S. HORTON,
*Of Counsel for Defendant.*

The cause came on for trial at the regular April term, 1919, of the above-entitled court at Dubuque, Iowa, on the 2 day of May, 1919, before the Honorable Henry T. Reed, District Judge
38 presiding, and said cause was continued from day to day until the 10 day of May, 1919, during which time the following

witnesses were produced, sworn and examined on the part of the respective parties thereto, the following evidence and testimony offered, introduced, or received or rejected, and the following objections were made, the following exceptions taken and saved, and other proceedings were had, as shown hereinafter. And the cause being called for trial, it was agreed by all parties that R. C. Turner should act as the official reporter of said Court for the trial of said cause, and it was so ordered by said Court. A jury of twelve men were impaneled, and upon recesses, the Court gave proper, legal, and usual instructions as to their duty to the jury. Opening statements were made by the counsel respectively and the following testimony was offered or introduced, as shown in this record:

Plaintiff examined on his own behalf, testified:

Will be 35 next birthday. Have been railway postal clerk 8 years, the last 7 years over the Illinois Central. Have resided in Dubuque 7 years. Am a citizen of Iowa, born at Aplington, Iowa. During last 5 years service has been over the Illinois Central Railroad Company's lines between Chicago and Sioux City most of the time. Was so engaged in May 1918 from Dubuque to Sioux City. On the night of May 28, 1918 left Dubuque on train No. 11 of the Illinois Central about 10:15 I think. Train was composed of all steel cars, a storage mail car and mail car, baggage car, smoker, a day car I think they call it and three Pullmans. Baggage car was blind baggage and express. I was riding in the mail car second car back of the tender. There were 7 other clerks. Cleaves, Dewey, Stannard, Widmeier, Ray, Redman and Lowe all in the mail service. My position at that time was a mail clerk. Had been running on this same run since August and on other trains longer than that. It was the custom to ride in the mail car in the performance of my duty and I was permitted to do that under my employment as a mail clerk. Have not my commission with me. It was taken from my clothing in the wreck and delivered to the chief clerk at Dubuque. On that night I remember passing the town of Parkersburg where the train stopped. It was not scheduled to stop at Aplington and did not. My duty was working letter mail. That means taking the letters that are made up in packages and separate them for the different postoffices. Was located in the middle of the car on left side or south side. They stopped at Water-
39 loo, next stop was Cedar Falls. I think we arrived at Waterloo on time. I think we left on schedule time but don't remember what time. Next station was Cedar Falls and the next would be Ackley. It is 14 miles to Ackley. Between Parkersburg and Aplington is 5 miles. Glen Dewey was dispatching clerk and put off the mail at Aplington that night. From where I was I had no view of the doors. I remember reaching Aplington. The night was threatening when we left Waterloo and it was very dark. I would say we were running between 50 and 60 miles an hour and they did not slow down after going through the town of Aplington. Brakes were not set. First thing I remember that happened after

going through Aplington was a sudden grinding crash and the electric lights went out. I would say I became unconscious. Found myself suspended underneath the window partly out when I first discovered myself. The first thing I noticed was an awful burning underneath my arms and something pinning me in the back and the shrieks of the men that died. It was very dark. I do not know what was pinning me. The mail car I was in was on its left side, the head to the north. The window toward the head end, the first window from the door. That would be on the right side of the car. I was suffering intense pain. I could hear voices I thought I recognized. I could hear one party yelling to get off of him. Not positive who it was. I straightened myself up and pushed the upper part of my body through the window and got my arm on top of the window and drew myself up and managed to push myself through the rest of the window. The car was lying directly over the creek. The day coach, front end of it, stood over our car and the rear end of another coach. Did not know where the baggage car was. My clothing did not come with me. Was hanging about my feet after I managed to struggle through. Entire clothing, underclothing, overalls and shirt. First thing I did was clear the blood from my eyes. My head was cut in the scalp. Three cuts over my eyes and bleeding. They did not help me through the window. As soon as I managed to draw myself up through the car I received help at the door. Dragged myself along the top of the car and edge of the roof. They helped me into a coach that was angling to the track. It was pitch dark. Sank down on the floor. Do not know whether I lost consciousness there or not. They helped me back into the coach. Remained there possibly an hour. I saw them bring Ray, Stannard, Cleaves, Dewey and Lowe there. Ray and Stannard are both dead. When I became conscious after the wreck I heard the awful rush of water under the car. I was taken from the day car to the sleeper and placed in a lower berth. Remained there possibly two hours. Mostly the worst suffering was in the back. Burning felt like hot water. Not positive what it was. I do not know whether I remained conscious all the time in the berth. It was about 2:08 when the lights went out and heard the crash. Not over two minutes from the time we left Aplington. It was about daylight when we came to Waterloo. I think about 4:30. They took me to St. Francis hospital. Came by train in this Pullman which is part of the train in the accident. Doctors Porterfield, Sigworth and Nestor attended me. Was taken there without being consulted. Did not select the doctors. Was at that hospital two weeks. Some of those doctors continued to wait on me during that time. I think Dr. Nestor called on me the third day and Dr. Sigworth the fifth day and after that Doctors Sigworth and Porterfield attended me generally. I was in terrible pain, suffering pain in the back and burns. The treatment given the burns was [paraf-ine] treatment. Burns washed with alcohol and the [paraf-ine] heated to 120 degrees and spread over the surface. Heated the [paraf-ine] and put on hot with a brush. It was very painful. I was in bed the whole time I was in the hospital two

weeks. Awful pain in the small of the back through the hips here. At [—] sharp pain, at others dull. I had several burns on my back. The pains were not caused by the burns. Treatment given me about 9 or 10 the first morning of our arrival at the hospital. Stitches were put in over the eye and in the scalp. Gut I think. I was given no anaesthetic. After they finally made an examination of my back they bound it with adhesive tape [possible] one and a half inches wide. It was put entirely around my body. Directly around the top of the hips. The lower end. Dr. Porterfield put it on. I think they rolled off the first night and they were not replaced until the day I left. Dr. Roundtree examined my back before these bandages were put on. Dr. Porterfield was present. I think it was Tuesday following a week from the day we arrived there. Wednesday, May 29th. Accident happened on Wednesday. This was the following Tuesday. In two weeks was brought to Dubuque. Dr. Roundtree made an X-Ray examination. Dr. Porterfield was present. After the X-Ray was taken the bandages were put on. I am not positive that Dr. Porterfield was present. Dr. Roundtree came to my room and said that Dr. Porterfield had ordered an X-Ray picture taken. I came to Dubuque June 13th. I could sit up [them] some of the time. I could walk some.

41 Did very little sleeping in the hospital. First night I didn't sleep until I received an opiate and then [possible] two hours. I slept after that possibly three hours a night. Probably slept three hours out of the 24 during the entire time I was in the hospital. At home Dr. Forward attended me until after the first of November when he died. Then employed Dr. Killeen of Dubuque. Has been attending all the time since. I spent two weeks in the Finley hospital in January. Outside of that time have been home. Have not been able to resume my work as mail clerk. Have not resumed my work as mail clerk.

Q. State what has been your condition as to being able to perform any sort of physical work since the time of the accident?

This was objected to as calling for a conclusion of the witness and a matter inherent in the verdict of the jury, not expert testimony and not a statement of fact or description of fact but a mere conclusion.

Objection was overruled and exception taken.

A. I have been able to do very little at a time, never over an hour and a half or two hours, a little light work. I help about the house a little. Work out in the garden for short periods. Working or lifting causes severe pains in the rectum and in the scrotum. Never experienced any trouble of that kind before. Health had been perfect. Never suffered an injury before, prior to this accident. Before the accident weighed 200 to 210. Weigh now 172.

Q. Prior to this accident state whether or not you had ever had any severe disease.

Objected to as calling for conclusions and not a statement of fact and calling for a non-expert testimony and no foundation laid.

Overruled and exception taken.

A. I have not. Prior to this accident had never had any accident or injury. Am 5 feet ten and a half tall. When I came to Dubuque I could sleep fine. Slept perfectly up to the time of the accident. Since I came from the hospital at Waterloo I have been able to sleep only with the assistance of some opiates or sleep medicine of some kind. I wouldn't say it was an opiate. I have been nervous. Prior to the accident I always felt I was jolly enough and good natured. No trouble with nervousness.

42 Q. Mr. Dahn you say you have been unable to sleep during this time since the accident. Can you describe what it is that keeps you awake or causes you to waken and prevent sleeping?

This was objected to as calling for a conclusion and not statement of fact and calling for a self-serving declaration.

Overruled and exceptions taken.

A. Well, at times I wake up with a start and at other times I wake up and [fine] both hands and feet asleep. I dream of horrors and wrecks. I have never been troubled that way before. One or more X-Ray examinations were made of me at the Finley hospital at Dubuque. I think the first one January 13th. [*Physical*] examined me a few days later, possibly the 16th. They put on a tight binder, 7 straps that hold hips perfectly in place. Two straps, one around each leg that holds it down and besides that I have adhesive plaster over my hips from there clear around to the point, the same place on the other side. Dr. Killeen ordered these treatments after consulting with other surgeons. At this time the defendant moves to strike out the answer: "Dr. Killen ordered these treatments after consulting with other surgeons" as he could not anticipate the answer and could not get time to object and for the reasons that it is immaterial, incompetent, no proper foundation laid, calling for testimony of a non-expert witness without any showing of testimony or treatment or reason for the treatment. If this evidence was admissible a party getting ready for law suit could have any treatment made, or any change made and introduce evidence without any foundation.

Objection overruled and motion overuled and exception taken.

[—.] I have these bandages on now. They were put on in the hospital the 16th of January. Wear it continuously.

Q. State whether or not that is taken off at night or whether you wear it night and day.

The following objection was made:

The question is leading and suggestion, immaterial, no foundation has been laid, no proof of testimony of wearing of any of these bandages, a mere showing that some persons put them on, it is prejudicial and a conclusion of the witness.

Objection is overruled and exception noted.

43 & 44 A. I wear it continuously. When the accident happened was receiving $1,500 a year besides a per diem for [means] and bed of about $100 a year making a total of $1,600 a year. Had been getting that for two years before the accident.

* * * * * * *

45 The three doctors I have mentioned came to see me not all at one time. I had some severe cuts over the right eye and the left side of the top of the skull. I think there is no hair cut there. It has all grown out. I haven't examined whether there is scar there. I felt something like hot water. I never was in the stream. I don't know the exact area of the burned side. It was on this side and under this arm (indicating his right arm) and under the shoulder. The right arm and right side down across the abdomen across the right side there did not leave permanent burns only small scars. I have burns scars on my person. I don't know the size of them. Didn't look under my arm. How can I see up there. Haven't any scars on my right side as I know. [Paraffine] was put on each burn. I saw across my abdomen up the right side and under the right arm down the upper part of the right side. No scars left except under the right arm and arm pit. They have not excited my interest to such an extent I have looked at them for quite a [while]. In the hospital doctors first trips together and some times separate. Nurses were there. They told me what [injured] they could see. They all of them told me. I told them of my sufferings and what I suffered. I eternally insisted I was suffering pains in the small of my back. Not one of them ever looked. With three doctors and nurses around me they made no good examination. They said it was possibly shock or something of that kind. Made trifling examination. They didn't give me medicine and after a lot of coaxing received a little back lotion. These 3 doctors and nurses at St. Francis after I begged a little lotion I got some after a

46 long time, about three days. Not to my knowledge they didn't examine it. They merely fixed the cuts and burns up and put me to bed. They made no examination as to my hips and back first day, nor for three days and not one of them, of the three doctors and nurses, then I came home. I called their attention to my back until they finally made an X-Ray at Waterloo. Dr. Roundtree made it; Dr. Porterfield was attending. I am not positive whether he was present when the X-Ray was taken or not. I think Dr. Porterfield put on strips the next day after the picture was taken. One across the upper part of the hips, one about two inches higher, and possibly one above the navel. I don't remember the day. It was in May or June. I think he brought the adhesive on Wednesday, a week after following entry to the hospital. The X-Ray was taken by Roundtree at St. Francis, Waterloo. The strips were put on the next day. The next X-Ray pictures were taken in January. It was after this suit was begun, Mrs. Camm took the X-Rays in Finley hospital. I think she took two good sets but I don't know. I suppose that we have the sets now. Plates so far as I know are at the hospital. Dr. Forward was dead when the plates were taken.

Dr. Killen is a lady physician. Been attending me since the first of November. Don't think dreams were caused by anything I eat. I think I have been kind of ugly and cross. Certainly have. The X-Rays I think were taken January 13th, I went to the hospital to have them taken. Mrs. Camm did the work. I weigh 172 now, I am not poor now but poorer than I was. Am living now at Asbury 4 miles west of town on a little farm. My wife and I keep a garden, truck and garden of seven and a half acres. These plasters or bandages were suggested by Dr. Killeen After X-Ray were taken. The X-Ray was taken January 13, 1919. I had the bandages on when I left Waterloo. The doctor removed them when I came to Dubuque. I couldn't guess the number of times Dr. Killeen has treated me. After January 13th or 16th the bandages haven't been taken off at all only to have new ones put on. That is all the appliances she has used. Wouldn't say that I have taken opiates but it was something to help me sleep. Dr. Killeen since Dr. Forward died has been giving me that. Ever since I arrived at Dubuque. Take it as often as three times a day sometimes. I don't know what it contains. Liquid. I am supposed to take it at her directions. I take it when I don't sleep. It is something that helps me get rest. I don't take it when I feel I want it. My wife handles the [*the*] giving of it to me. On an average of one and a half a day.

47-54 Redirect examination:

The burns finally healed about the first of August.

Recross-examination:

If I undressed now the jury would not see any permanent burns I think.

Q. I ask you without asking you now to undress, if you are undressed now would the jury see any signs of permanent burns on your body up and down where you describe.

A. Any permanent burn, I think not. I think all the burns will heal up I am glad to say they will.

Q. I didn't ask you will heal up. Can they be seen now?

A. They are covered with scar tissues. In other words, they will in time.

Q. Have you any objection to presenting yourself to the jury undressed?

A. Why, no.

Q. Now there is one other thing Mr. Dahn I would like to ask you. It is pretty near to the end of this, do you have any objection to submitting yourself without an order of the court to an examination by a couple of physicians we will furnish in the presence of an equal number of any you will furnish.

This is objected to as not proper cross-examination, not proper to be asked, and incompetent, irrelevant and immaterial.

The Court: You can answer that or not, just suit yourself.

A. I see no need of further examination. I think I have had examinations enough.

Redirect examination:

Q. Did you employ Dr. Porterfield, Dr. Nestor and Dr. Sigworth to wait on you there?
A. I did not.
Q. Did any one employ them at your request?
A. No. I testified as living on a little farm of seven and a half acres. I hire most of the work done. At the present time my wife's father is doing the work. Dr. Killeen put on the bandages last January and changed them each time they have been changed.

* * * * * * *

55-57 GEORGE E. MEYERS, called in behalf of the plaintiff, testified:

* * * * * * *

58 This railroad bridge is a mile and a half west of Aplington. It is about 18 feet above the level of the ground just to the north of it. It is about 60 rods north of the highway bridge.

(Exhibit "F." a plat, was marked for the plaintiff.)

That is a rough plat, showing in a general way the situation of the town of Aplington, the railway bridge, and the highway bridge to the south of it, also the creek running under the railway bridge and the river running along the north side of the railroad. That creek is what we call the dry creek that runs into the Beaver. I never have investigated that to give distances. I should judge, in a general way it runs about 20 rods from the bridge to the Beaver. The Beaver River to the north of the railroad flows east towards Aplington, at some places possibly forty rods from the right of way. There is a branch runs along perhaps 10 rods close to the right of way between the Beaver and the railroad on the north side of the track. I should think it was about a rod from the right of way fence at one place. It flows possibly 6 rods from the railroad right of way on the north. Along the Beaver River opposite this bridge down to Aplington it is low ground. It overflows when the Beaver is high. I didn't notice it this night or the next morning, only our residence is across Main Street and we could see it flooded up there. This creek that comes down under the highway bridge and under the railway bridge in question comes from the south west between six and a half and seven miles. The width of the territory, I would think, that it drains, is about a mile. Up above the highway there is another creek that joins it from the east. I remember the location of the car that was on the north side of the track and over to the west of the bridge. This here shows the car on the north side, the picture, Exhibit "C." The front end of that car on the north side was 80 feet from the end of the bridge. It went beyond the right

of way. The front end of the car struck a tree. I should judge it would be about 12 feet high. I judge it was 80 feet from the railroad bridge. There was a car off to the south west about the same distance on the west side of the creek. I call it the chair car—smoker. The baggage car was under that car, the chair car.

59-67 Cross-examination:

(Witness' attention called to Exhibit "A.")

The lower car in that picture was the baggage car, I mean, mail car. The car was running through the baggage car.

* * * * * * *

68 (*Stipulation as to Citizenship of Defendants.*)

Judge Lenehan: "It is admitted, if you Honor please, by the defendant, that the Illinois Central Railroad Company is a citizen of the State of Illinois, and was at the time of the commencement of this action, and that William McAdoo, Director General of Railroads at the time this action was brought was a citizen of the State of New York."

The Court: The Illinois Central was a citizen of Illinois wasn't it?

Judge Lenehan: Of Illinois, yes.

Judge Helsell: Of course, your Honor please, this admission is made with the reservation, with the exception and reservation that the Illinois Central Railroad is not a party to this suit and has no interest therein, and consequently it is immaterial as to the evidence.

The Court: But when the suit was filed against the Illinois Central it was a corporation of Illinois?

Judge Helsell: Yes, sir, we admit that, but object to the materiality of the evidence.

The Court: You are excepting to everything and that is understood.

Judge Helsell: I beg your pardon.

The Court: What about the present Director General?

Judge Lenehan: That is why we wanted to call the attention of the Court to this today at this time. Mr. McAdoo was the Director General of Railroads when this suit was brought, and as I understand under the rulings of the Court and the view in which this case is looked at in the courts it is the Director General of Railroads who is the party to the suit. Now I do not suppose that the
69 mere fact that Mr. McAdoo has ceased to be Director General of Railroads would abate the suit, or that the citizenship, his citizenship, the citizenship of his successor in office would be material, even if it is sought to be changed. Now that is the view we take of it.

The Court: And this is the allegation of the petition, as I remember it all along, that the defendant William McAdoo is the Director General of Railroads of the United States of America, and is a citizen of the State of New York.

Mr. Smith: Now that is admitted.

The Court: That is admitted now, that when the suit was brought he was such a citizen, and it is alleged in the petition.

Judge Helsell: If the Court please, I have admitted that that statement that Mr. McAdoo was Director General of Railroads at the time this suit was started, was a citizen of New York.

The Court: Then when the suit was commenced the allegations were alleged in the petition.

Mr. Smith: And now they are admitted.

The Court: Not until this amended answer to which I sustained the demurrer on last Friday, or some day, was that allegation ever denied, and it is not directly denied even in that amendment if I remember correctly.

Judge Helsell: The status, if the Court please, is this: The suit was brought against the Illinois Central Railroad Company and William McAdoo, Director General of Railroads; by our motion that was overruled as to Mr. McAdoo. The court retained jurisdiction of McAdoo, Director General; at the same time your Honor sustained a motion excluding the Illinois Central Railroad from this case.

The Court: Yes.

Judge Helsell: Now, in the meantime and before this case is reached for trial another Director General was appointed, and I took the position that Your Honor, if you had jurisdiction of the case at all, retained jurisdiction because you had jurisdiction of the Director General, so I filed an answer for Mr. McAdoo as a matter of caution, asking that he be dismissed from the case because he no longer was Director General, and I also, so as to raise no question on these gentlemen at all, appeared for Walker D. Hines, Director General now.

70 Judge Lenehan: If there should be any question as to the citizenship here, what do you say as to the citizenship of Walker D. Hines?

Judge Helsell: I will admit he is a citizen of New York, because it is true.

The Court: That Hines is?

Judge Helsell: Yes.

The Court: Let the record show that Walker D. Hines has been and is appointed Director General, that this action is against him solely as in an official capacity and not against him personally, and that personally and individually he has no interest in said cause, and has never had, and except in connection with his official duties, and the motion is that he be dismissed from said cause.

Judge Helsell: Your Honor is reading the answer that I filed for Mr. McAdoo.

Mr. Smith: That refers to McAdoo.

The Court: Yes. This is the answer you filed for McAdoo, on April 23rd, the third day of this term, so until that time he was on the face of the record the defendant; and did I make an order substituting him?

Mr. Smith: You made an order, I believe, substituting the Director General of Railroads for him.

The Court: The present Director General?

Mr. Smith: Under General Order No. 50-*a*, the name of the new Director General doesn't have to be named, and I think the order was made pursuant to that.

Judge Helsell: Not only it is not necessary, but the order says that the suit shall be continued against the Director General of Railroads.

The Court: Well now, the Director General of course is the defendant, when that order was made, Walker D. Hines; so he is the defendant.

Judge Helsell: Your Honor, I may misunderstand it, but I don't think any individual is named as defendant, only just the general term, Director of Railroads.

Judge Lenehan: That depends on how that order reads. It isn't against Walker D. Hines personally in any event.

The Court: I don't understand you.

71-74 Judge Lenehan: I said of course that the action is not personal to Walker D. Hines, but in his capacity as Director General.

The Court: It is the official, as officially he is the defendant, and I see no harm in naming him as such.

Judge Helsell: Your Honor, I wish to state of record that while I have authority to appear for the Director General under the name suggested in 50-*a*, I have no authority to appear for Walker D. Hines, personally, or where he is named in the——

The Court: Well, the suit in any event, Judge, as I understand it, is not against him personally, it is against him officially; and my understanding is that you have got to have the name of somebody as a party to the suit, and his name is here as an official, as Director General; that is all there is to that. Now it is admitted that Walker D. Hines,—the citizenship of Walker D. Hines is New York; is that correct?

Judge Lenehan: Yes.

Judge Helsell: Let the record show that.

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75 GLENN L. DEWEY, called for the plaintiff, testified:

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76-93 Altogether there were eight men in the car. There were no men in the storage car. It was about three hours before they took me out. Most of the men were in the sleeper when I was taken out. Mr. Widmeier and Mr. Ray were dead. Mr. Stannard is dead. Mr. Widmeier is dead.

* * * * * * *

94 T. J. VAN METER, called for the plaintiff, testified:

I am employed by the Illinois Central Railroad Company as section foreman. Live at Aplington. Was on May 29th, 1918. Had been in that capacity for sixteen years. Was a laborer for five years. My section was seven miles, four miles west and three east from Aplington. Was on duty on May 28th, 1918. I had in my employ eight men on the night of May 28th. Got up a little before eleven. Went out patrolling. Took three men. Went east from Aplington about a mile and three quarters. Went afoot. We don't generally patrol with a car. Didn't patrol west on that track at all. As section foreman am furnished with a rule book by the Company.

(Exhibit "I," marked for the plaintiff, rule book.)

Q. I will show you Exhibit "I" and ask you to state if that is the Rule Book that was furnished by the Company and that was in your possession at that time?

A. Let me see if my name is there, it was on.

Q. Yes.

A. Yes, sir, that is it as far as I know.

Q. And Exhibit "I" is the Rule Book that describes the duties that you had to perform as section foreman, is that correct?

Judge Helsell: I object to that for the following reasons: not shown when he received that book. The Illinois Central
95 Railroad Company, judicial notice being taken, was under the control of the Director General of the United States, acting in whatever capacity he was acting at that time, and the directions or rules of the Illinois Central Railroad Company are not shown to have applied to the control of the man or management of the Director General, and were not furnished by the Director General, and not shown to have been operative under the rules of the Director General, no foundation laid.

The Court: So far as the time when that was received by this witness your objection I think is well taken, otherwise it is overruled.

Mr. Smith: I will just withdraw it in that form.

Q. When were you furnished with this book, Mr. Van Meter?

A. Well sir, I couldn't tell you the year.

Q. Now just look at the book and see if you can tell?

A. This says 1916.

Q. And is that the time you received it?

A. I suppose it is.

Q. Now were you ever furnished any book after that?

A. No, sir.

The Court: His supposition isn't material.

Mr. Smith: No, it isn't.

Q. Were you furnished any other book other than this as the rules under which you should operate and perform your duties?

Judge Helsell: Object to that as immaterial unless it is shown that he was furnished a book by the Railroad Administration.
The Court: Overruled.
Judge Helsell: Exception.

Q. Answer the question.
A. What is the question?

(Question read to the witness.)

A. No sir, that was the last one.
Q. That was the last book that you received, you don't know just when you received it?
A. No, I couldn't say.
Q. But you know that it was the book that you had at this time that I inquired about at the time of the accident?
A. Yes, sir.

96 Judge Helsell: I object to that as leading and suggestive.
Mr. Smith: He has already testified to it.
Judge Helsell: I know, but you overlook the fact that he testified that he received it in 1916, you are trying to make him say that he don't know when he received it.
Mr. Smith: He testified he supposed he received it in 1916, he said he didn't know.
Judge Helsell: Then he may have received it after the accident.
The Court: His supposition, I said, Mr. Smith, wasn't proper, and told him to fix the time as near as he could.
Mr. Smith: He hasn't been able to do that, but he has testified that he had it at that time.
The Court: At the time of the accident?
Mr. Smith: Yes.

Q. And up to the time of the accident had you received any other book than this one book of rules?

Judge Helsell: Objected to for the same reasons as last above without it is shown that it came under the direction of the Administration.
The Court: Answer the question.
Judge Helsell: Exception.

A. How was that question?
Q. (Question read to the witness.)
A. Well the book before that was called in and that one was put in its place.
The Court: This one here?
A. Yes sir.

Mr. Smith: Now the plaintiff offers in evidence Exhibit "I", and for the purpose of the record Your Honor, and to permit the witness to take the book back with him may I read into the record the special part that I desire to offer?

Judge Helsell: I presume, if the Court please, that I might ask a question prior to making an objection to it?
The Court: Oh yes.

97 Cross-examination.

By Judge Helsell:

Q. Your best recollection is that you got that book in the year 1916?
A. Yes, sir, that is it.
Q. And you have received no other book you say?
A. No sir.

Judge Helsell: We make the following objections to the admission of the book or any part thereof, that no foundation has been laid for its introduction as being governed or governing him under the Railroad Administration; no showing that it was put out by any authority of the Railroad Administration, or adopted by the Railroad Administration, and for the further objection that rules of the character that are put out in said book are for the guidance of the parties to whom they are sent and are not made for or in behalf of the public or any one else, and the test of whether or not there is negligence cannot be determined by rules where a third party is involved, but must be determined by the facts and conditions as shown at the time, in other words the proper evidence is not the rule, the obedience or disobedience to it, but the evidence is the evidence of the facts shown in the trial.
The Court: Objection is overruled.
Judge Helsell: Exception.

Redirect examination.

By Mr. Smith:

On Page 3, under "General Rules."

(*a*) Employees whose duties are prescribed by these rules must provide themselves with a copy.

(*b*) Employees must be conversant with and obey the rules and special instructions. If in doubt as to their meaning they must apply to proper authority for an explanation.

On Page 8, under "Rule 16."

"In case of threatening or prevailing storms track must be patrolled and all bridges, culverts or particular localities in track liable to be affected by such storms must be closely watched. Force will be freely used to patrol the track under such conditions. When traffic is obstructed the completion of repairs must be promptly reported."

98 On Page 58, under "Rule 199."

"Watching in Bad Weather. During heavy rain and wind storms every precaution must be taken to prevent accidents. Each section foreman must be out and have with him a sufficient number of men to insure safety to trains. It may occur that wash outs cannot be prevented, but by proper watching on the part of section foreman and men trains can be kept from running into them. Men going out to watch track in storms must have with them the necessary signals and torpedoes to stop trains. During heavy storms culverts and drains must be inspected and all drift material removed from them."

Judge Helsell: Now to make the record complete, if the Court please, we move to strike these rules read into the evidence for each of the reasons stated, and because of the further fact that these rules are not proof of negligence, and cannot be used, or the failure to use the rules and comply therewith, do not constitute negligence or evidence of negligence.

The Court: What are the number of the rules that [your] read into the record?

Mr. Smith: The first was "*a*" and "*b*" on Page 3, then Rule 16, or part of Rule 16, on Page 8; Rule 199 on Page 58.

The Court: That is the book of rules out in 19——

Mr. Smith: I will give the title of that too for the purpose of the record. "Illinois Central Railroad Company. Rules and Instructions for the Maintenance of Way and Structures. Effective January 1st, 1916."

Judge Helsell: I want to add to the objection if the Court please the further objection that [—] irrelevant to any issue presented in this case.

The Court: The objections are overruled.

Judge Helsell: Note an exception.

[—] I took three men with me on the patrol. The other five men were home.

Cross-examination:

Was up to about two o'clock then went to bed. Was about 11 o'clock when I started out. I had a piece of soft track east of Aplington. Went to that place. There was no danger there. It
99–107 began to rain earlier than half past ten but not hard. That is the first I noticed it. As soon as I noticed that I went out to patrol the track. I went because I understood that was the place that would be dangerous if there was danger on the line. That was my weak place on the section. That was the only place there was any possible danger.

* * * * * * *

108 Dr. MARY KILLEEN, testified for the plaintiff:

Have practiced medicine 15 years. Graduated from the University of Ann Arbor. Took collegiate work at the State College at Cedar Falls, Iowa. The Normal School. Took regular course at University of Michigan in medicine. Not practiced any where else except Dubuque. I know Arthur Dahn. Have been his family physician. Have treated him since he was injured commencing between the first and middle of Nov. 1918. I think I knew him intimately before the accident. He looked like a physically well man. He was stout. Somewhat overweight. He was cheerful and optimistic, pleasant. First saw him in the middle of Nov. in my office. Made rather superficial examination.

Q. At that time what did he complain of?

169 Objected to as calling for self serving declaration after the beginning of this suit and hearsay testimony and a conclusion, and assuming a fact not in evidence.

The Court: Was this at the time now he called upon you for treatment?

A. Yes.

Objection overruled.
Defendant noted an exception.

A. He complained of general weakness and pain, inability to sleep, and inability to work.

Q. Where did he complain of having pain, in what region?

Same objection as last above were made and also that no part of res gesta.
Overruled and defendant excepted.

A. Principally in the back.

Q. At what part of the back, if any, was specified?

Same objections as above.
Overruled and exceptions taken.

A. In the lumbar region and from the upper lumbar vertebræ right through the pelvic region in the back.

The lumbar vertebræ begin at the insertion of the last rib, and the lumbar vertebræ are five in number and lie between the last thoracic and the first sacral vertebræ. They consist of part of the column of the spine, a lamina of side frame, called laminæ and transverse processes. The transverse processes are bony structures. They are at right angles to the plane of the cord which runs through the center of these various bones that make up the column. I believe at that time I examined his heart. I am not sure of it. I think that is what I did the first time he came to see me. I think it is possible to examine the lumbar vertebræ with the hands so as to indicate the position of the spinal column. I think the spinal column is rather superficially placed on the body. It is overlaid at either side with muscles and fat and skin and at the same time we consider it a super-

ficial structure. I wouldn't say you could find a displacement but a large enough fracture I believe you could by the hand. In January I made an examination of his spinal column. I made one in December. When I examined it manually I simply found that he had tenderness in certain regions of his spine, from the
110 lumbar region down. Next examination same way in January. Discovered nothing further. I advised rest and give him sedative medicine and tonics and bromide. Bromide is mildly a sedative salt that is used to quiet nervous irritability. Nothing in it that induces sleep. I gave him tonics. Probably iron mixture. He complained of inability to sleep. From the time I first began to treat him until the time I made the second examination I tried some other medicine to induce sleep. Sulphonal or trional, one or the other. This is medicine to produce sleep. I probably gave him ten grains at retiring and repeated once during the night if necessary with half that dose. Have treated him medically down to the present time. I found trional didn't agree with him so I had to discontinue that and added to his bromide mixture a narcotic. Codein with a bromide. From an eighth to a quarter of a grain a dose. Upon retiring and repeated once or twice during the night if necessary. Gave the directions to his wife. When he was in the hospital to the nurse. Don't remember what nurse. That has continued down to the present time practically. An X-ray examination was made of the lumbar and sacral regions. The sacral region is made up of several vertebræ which diffuse together and this bone forms the back of the bi-pelvic wing, or the back of the so called hip bone. The coccyx unites with the sacrum. The ilium is a large hip bone which joins the sacrum on either side. There are two iliæ. I applied a support to his back over his sacral and lumbar regions. The support was in the form of an overlapping layer of adhesive plaster and it was applied from the hip on one side around the back of the trunk and about half way around the abdomen. These were repeated overlapping one-third of an inch until the entire region from the top of the lumbar vertebræ down as far as we could on the sacral area was covered. These are adhesive straps. Kept lying down in the hospital for two weeks. We had a sacral appliance made for him. It consisted of a band which encircles the lower part of the abdomen and which can be tightened; it has a rigid portion in the back, rather rigid, and under straps to hold it in place. In this band is steel. The bandage that goes around the body is fastened in front. Is eight or ten inches wide. I believe we had the first about the first of March. I advised that he wear it night and day and think he does. Mrs. Camm made X-ray pictures under my directions. I know some were made when I was present. I practiced the are of making skiagrams. Have machine in my office. Have taken pictures. Studied at Ann Harbor. Had the greatest X-ray
111 man we have had in this country talk on Roentgenology while I was there. Studied under him there. Have had experience in reading pictures. Have seen Exhibit "M" before. It is a picture of the lumbar spine with a portion of the sacral vertebræ and a small portion of the iliæ. That was made at Finley hospital.

Exhibit "M" was offered in evidence. Defendant objected because under the statement of the parties that took it it is a picture that does not necessarily correctly show the part supposed to be disclosed, because it is liable to confuse an inexpert, and [*and*] because it is not properly identified, and proper foundation has not been laid. As to the examination of this witness on the subject we submit that upon the question as an expert in delineating these pictures or in making them, a foundation sufficient therefor has not yet been shown, if the plates themselves are held admissible.

Overruled. Exception noted.

The lumbar vertebræ, one, two, three, four and five, just below that is the sacrum. The sacrum fits right in here. There appears to have been a fracture of the transverse processes of the lumbar vertebræ. First four from above down. The simple line indicates the fracture on the picture. That line indicate- the lumbar vertebræ. These are the transverse projecting portions of the vertebræ are called transverse processes. I have in my hand portions of the spinal column which indicate the lumbar vertebræ. These are the transverse processes on each side (pointing them out). There is no other evidence of fracture in this picture. "N" is a picture of the lumbar spine, the sacral and most of the pelvic circle.

("N" is placed in the box and witness says:)

Exhibit N was offered in evidence. The picture shows the fractured portions of the transverse process united and shows a separation and relaxation of the joint, the sacral-iliac joint, that is the joint which exists, or union which exists between the sacrum and ilium or iliæ. The joint between the sacrum and the iliæ, the two bones here, is a flat joint which is immovable. There isn't a cartilage which allows play between the bones, but it is a rather wedge shaped articulation somewhat like this, and by looking at an X-ray from back to front this way you ought to see two lines showing this, where the back part of the sacrum units, and where the front part, but that is all you ought to see; and you see these two lines, this is where, what you would look at in the front, and this is what you see where the
112 back part of it unites. In taking this picture we endeavored to get in both the lumbar region and the sacral region, to get it all in and for that reason there wasn't a compressor [*diaphragm*] used and no compression was used when this picture was taken. Several plates were taken when I was there. You can tell he was lying on his back from the position of the subject in the picture. You cannot tell more than that.

Q. Now is there anything else that is indicated in this picture as you read it that shows any abnormal condition of these hinges or whatever they are called, of these two iliæ where the two parts of the bone are joined together?

A. I wouldn't say so, not more than I have described. There is nothing in the picture that is abnormal. Exhibit O offered in evidence. Exhibit "O" is a picture of the bony structure of the pelvis. I was present when it was taken. Shows portions of the fourth

lumbar vertebræ, the last lumbar, the fifth, the transverse processes, the sacrum, iliæ, and the upper portion of the pelvic bone, also the coccyx. Now these two lines I have referred to in that former picture, where that thickened joint or thickened surface joins, we should see them and we do here and there. However this is too widely separated for a normal synchondrosis. That joint is where the bones actually grow together and there isn't any play when they are normal. When they become separated it becomes a separated, relaxed sacral iliac joint so it is relaxed here. There is a wider line than we should see, a wider separation, and then we shouldn't see all of these little lines here, they don't belong there. They indicate fracture. Usually the cause is some force applied from back to front, compression. These lines indicate not really a fracture but over relaxed, has been separated and hasn't gone back. These indicate fracture. These small lines. They look very small but when you come to think of it being the back of the ilium that is the back of the ilium that is attached here, separated, it means a separation. Here is another. There are at least two on either side. Where the ilium joins the sacrum is quite thick. Down this portion it is thinner. I think these fractures could be produced by force in the region of the back. The chance wouldn't be good for recovery after six months. Mr. Dahn was placed on his back and compression applied when this picture was taken. A compression cone is used to shorten the distance between the points of the rays and the subject taken. In bringing down the ray it pushes aside the other issues and brings the tube nearer to the object. After six months it would be necessary to expose the bony surfaces and liven the tissue,
113 that is by scraping away anything that has formed there. No other way to perform the operation. Think I have treated this man 30 or 40 times. Kept account of his weight. First time I saw him I thought he looked thin. He weighed 187. Weighed him two or three times since. Weighed him last week. He weighed 172. His loss of weight has been continuous. He is thinner, anxious looking, irritable acting, irritable in his manner than he was before he was injured. In some respects I think he has improved and in others not. He has lost weight and strength. Not able to work but little. Those are the two main things. I would think he was gaining. He is the most [*com*fortable] lying down, next-standing, uncomfortable sitting. That is one of the symptoms of relaxed sacral-iliac. Continuance of pain in his back is a striking symptom also.

Q. Does he still continue to [complain*t*] of pain in this lower region of the back?

Objected to as calling for repetition of mere self-serving declarations almost a year after the accident, and after this suit was pending and incompetent. Overruled and defendant excepted.

A. Yes. Think these injuries are permanent. These injuries might effect the urinary organs. He has a great deal of trouble with that tract. He hasn't complained of that lately.

Cross-examination:

I never took any lectures from any New York party regarding [redio] pictures. During the years 1903 and 1904 at Ann Arbor I don't know what time I spent taking lectures from any professor at Ann Arbor. Several hours weekly, Vernon J. Willey. The bending of the back bone arises from there being a cushion of cartilage between these two vertebræ all the way up to the neck. In taking a picture of the back bone in a usual picture the bone would appear the darker. A vacuum tube was used in taking the picture. I don't know the name of it. It wasn't a Crook's tube. An ordinary X-ray tube. I don't know the name of it. It was probably a Green & Bauer vacuum X-ray tube. This picture in the box was taken about January 1919. It would make a difference at what angle the ray was directed toward the back which side was the lighter or the darker so that the question of lightness would be governed quite considerably by the angle it reached the subject it was to picture. The sacrum is
114 that part of the spinal column that is at the bottom of the lumbar vertebræ with which it articulates. The last lumbar, the fifth and the first sacral articulate by a small cartilage or cushion. In this particular joint the cartilage isn't active. Probably never entirely disappears. It hardens but as a cartilage it isn't present. The usual tendency as a person gets older is to have that cartilage harden. In course of time that becomes practically as hard as a bone. There are two cup shaped bones in the seat that are on each side, or hip bones. Hollowed out. Perhaps you would call it a cup. The cup is on the inside of the body. The cup part of it and rounded out on the outside. By iliæ is meant the plural of ilium. In a baby there is perhaps some trace of cartilage but in adult life it is bony purely. To a certain extent it is similar to the hardening of the cartilage in the sacral region between the vertebræ. It is really one bone at birth. During fœtal life. Between the texture of the bone between the sacral bones and the ilium there is a difference but it is still bony. It would appear lighter. In a picture like this if there was no separation it would not appear lighter. As a physician I am able to say that the cartilaginous union of that bone in this particular man couldn't be detected from the bony part of it by an X-ray picture.

Q. Well I don't care what you call it, madam, it is the connecting link between the ilium and the sacrum?

A. You can make that out, yes. It would show lighter. [Shoe] less dense tissue. (Attention is called to the picture.) This is one of the lumbar vertebræ. This line across there that is a little lighter is an indication of the cartilage or lower border of the transverse process. This is the lower border. You can see here the transverse process on the right side of the picture as it now stands. You can see it. I suppose it is there. The shadow is that of the process. In this picture the four processes on those bones show. They stick out from the back bone transversely on each side. These are observable on either side. That white line which goes across is the cartilage. Any edge

throws that kind of a line. It isn't the cartilage that makes a white line. It is the angle the light strikes at. That is cartilage there and it is bone down to there. It is all bone up and down there. This crack here is a mark or ridge that goes right along the back part of the spine. That is through the bone and isn't on the side toward you. Looking down at it it looks kind of as though it was hollowed out, slightly concave. That isn't a bone. That is just tissue that shows there. Those tissues show darker than the bone, more distinct.

Q. Well I notice there seems to be a crack that comes up
115 here, is that a break?

A. No.

Q. I notice a crack that comes along there, is that a break?

A. No. It isn't a crack at all, that is an edge. The edge comes down here. That isn't a crack. That is the edge of the sacrum and here is the ilium in the shadow. I do not mean to say there are as many cracks in that ilium over here as there are white lines the attention is called to. Not all of those lines represent cracks. On the other ilium those lines aren't cracks. This is the line of union. The spinal cord doesn't appear in the picture. The sacrum is not one bone originally. Made up of five vertebræ. Probably in fœtal life or in early life these are five separate vertebræ and they fuse, grow into one bone. About the middle of the picture here down to where the coccyx appears there originally were five bones. The cartilage hardens between them and becomes bonelike. The picture does not show the other side of the bones. Simply transposes the position and except for transposing the position it is the same picture turned around. No matter which side of the picture you look at. It shows all of one part and you can see the low portion of the other. The lines marked right there are just the same as on the other side.

(Witness is shown Exhibit "N" and points out ten places where the processes are and pointing to the vertebræ on the left hand side, says:)

This is an articular facet as it is called and these two particular things. I don't see the transverse process of the thoracic. The picture wouldn't show it. That line is the line of the ilium on the one side and this is the wing on the other side. They are level with one another. This joint between the ilium and sacrum is the white line and this joint on the other side is the other line. They are both a little lighter than the bones on each side. The edge of the bones make that white line. That specially shows where the union is. That line around the lower part of the picture well defined and covering the blacker portion does not mean a separation. That is the upper brim of the pelvis. In other words, that shows there that it is and the white line above it shows the edge of it. Shows darker because it is heavier. I suppose that those spots where the sacral bones show lighter are not quite as dense. Diffused farther back from the tube and they are the most dense vertebræ in the body.

Q. The denser the dark- isn't it?

A. No, Just the opposite.

116 Q. The denser the bone the lighter?

A. This isn't bone at all; this is really dark as compared with white, the whiter the denser. The sacrum is probably three quarters of an inch thick. That is all. There is a line between the ilium and the sacrum. This is the front line. This shows the ilium. That is the union. The thicker the bone the lighter it is. It is probably half an inch. The sacrum right in the middle about an inch and a half and the lumbar from three quarters to an inch in a grown person. It differs in different individuals. Depends on different people. Cannot tell you the thickness of the widest vertebræ of a human being I ever saw. The protuberances are one third in diameter the thickness of the bones of the back. By careful examination you can see all the processes. They are really not over one fourth the size out at the ends. This white line around this portion of the sacral bone does not represent any crack. That line pointed out does not show anything. Indicate anything. The line that comes up through there does not indicate a crack.

(The witness is shown Exhibit "M" and points out ten processes plainly visible.) The space in the back bone between these lines having the appearance of being one-third to a half inch from bone to bone is cartilage. The bones are about an inch thick and the cartilage about a third as wide. The spaces between the back bone are filled with cartilage, or tissue. They look as though they were just a piece of cartilage between each and there are other tissues you don't see at all. The bone curves that way to admit the passing out of structures that come out right at these processes. The picture does not represent the spinal column as it would look if you dissected it. It looks somewhat like it. There is no question about seeing these different processes. That mark is just a defect in the plate. I don't say the mark the attention is called to means any split in the bone. I was the family physician of Dahn. He was over supplied with flesh. I would say that the normal weight of a man five feet nine inches tall is about 175. From 170 to 180 would be in the neighborhood of what a man in perfect condition of that height would weigh. A man of normal health five feet ten and a half under the tables would [weight] about 185. Many men weigh a great deal less, of that height, that are healthy. I have met him before the accident. Maybe ten or 15 times in three years. I don't think I gave him any special attention as a physician. The first time I met him as such was in November. Don't believe I prescribed or did anything for him before that. I did not prescribe chloral for the

117 back ache; nor did I prescribe sulphonal for the back ache. Didn't prescribe any of these medicines for the back ache. He was telling me all the time the terrible pains that he had in his back. It was some time in December that I first examined his spine. He came from three miles in the country down to the office. I don't remember how often but I have a record in my books. When I examined him in December, 1918 he had no marks of burns on him at that time. Had no marks of bruises. The stitches were all healed up. He hardly shows anything in his forehead. His forehead is pretty nearly as free from any sign of any injury as a forehead can

be. There is nothing important or any scar on his head. There is nothing you can see upon his back to determine in any way from looking at it anything the matter of it. Doctors must rely on the statements of their patients as to the amount of pain and the places. This is what is generally called subjective. I wouldn't have you think we always believe a patient has pain because he says he has. Now on his body when I first examined him there was nothing that would suggest pain. I mean upon his physical appearance. I cannot tell you how deep his flesh was around his vertebræ. There wasn't anything on the surface of his body that enables you to determine from that alone any injury that he received. I didn't take these pictures to another person to examine to find out whether they showed anything. I went to see Dr. Roundtree about his pictures. I showed these pictures to Dr. Roundtree.

Redirect examination:

In my treatment I had the history of his case from him. Knew he had been in a railroad wreck. Had been informed of how he had been treated. About the history of the case from him.

Recross-examination:

Sulphonal is used to assist sleep. Trional is used for the same purpose. Varonal we gave him for the same purpose. Bromide is a sort of a generic term of salts we used in medicine. In speaking of it as the laity call it, there are many different bromides. It is used to lessen nervous irritability. I understood from his wife the amount given. I know she couldn't get it without a prescription from me. I know about the length of time it took to use a three ounce bottle. When a bottle was empty she came to me for a prescription so she could go on with the same thing and I gave her a prescription to have it filled.

118 Q. Couldn't she take a prescription to the drug store and have it filled and take the prescription away and bring it back?

A. Some of the prescriptions she could, not all of them.

Q. How do you know what the druggists would do?

A. (No answer.)

Redirect examination:

The bone and the denser structures have a whiter appearance. Plates are used in negative to make pictures. When they are printed they appear the reverse. In these pictures, the lighter appearance indicates the denser material. I have been operating one of these X-ray pictures about 15 years. I cannot guess how many I had made. Hundreds anyway.

Recross-examination:

I have been making some for other people but mostly for my own practice. I don't know how many I have made the last year. Haven't been working much. Had these made at the hospital because I had the patient there. Prior to that time he had been out home, visiting me at the office and I took him up and confined him to the hospital for a course of treatment.

(*Stipulation as to the Expectancy of Life by the American Life Tables.*)

Mr. Smith: It is stipulated that by the American Life Tables the expectancy of life of a man at the age of 34 years is 32½ years.

The stipulation that by the American Life Tables the expectancy of life of a man at the age of 34 was 32½ years was immediately subjected to the objections as to its admissibility, no foundation had been laid for the introduction of such evidence and that it is incompetent, irrelevant and immaterial under the record in this case.

The Court: I will observe your objections and rule on it after while some time.

At this time the plaintiff speaks of the absence of the deputy Marshal they desire to use for a witness to show attempt to serve subpœna on Dr. Roundtree, and the defendant objects to going on with his case until all evidence is in on the part of the plaintiff.

119 (*Request of Defendant for Plaintiff to Submit Himself to a Physical Examination and Exceptions to the Ruling of the Court Thereon.*)

Judge Helsell: At this time, if the court please, the defendant in open court and of record asks the plaintiff and his counsel to submit himself to an examination physically on the part of two reputable doctors, the examination to be attended by any two reputable doctors that he may desire, and the doctors that the defendant suggests and the doctors that he selects to be present when the examination is taken, and permission from him and them to take an X-Ray this evening or tomorrow forenoon, of the same matters that the counsel have sought to prove, or sought to illustrate by the Exhibits "M," "N," & "O." The plaintiff has been in Court, has testified to his condition, others who make claim to have examined him have been in evidence, and their testimony taken, and we are calling the Court's attention to the plaintiff has taken the stand, has testified in his own behalf, to his injuries, and has described the injured members, and has described his injuries and suffering, and certain other evidence has been introduced in regard to the same matters, and we submit that we are entitled to this, and make the request of record.

Mr. Smith: I would say at this time, Your Honor, we don't feel that we ought to consent to any such examination as is at this late day proposed, that while we have offered every bit of evidence that we have been able to get here, there has never been any demand made

on us prior to this time before the jury for such an examination, and we don't feel that at this late date that we ought to be expected to submit to such an examination.

Judge Lenehan: * * * I just want to add one word to that, that is that Mr. Dahn was asked to submit to an examination at a request made by the representative of the Compensation Commission, and Dr. Pond of this city, who I understand is the local surgeon for the Illinois Central Railroad Company, was designated and made an examination of him and made a report in regard to it. Dr. Pond lives here in the city.

Judge Helsell: If the Court please I fail to understand why reference is so often made to the Illinois Central Railroad Company in this case, and take exceptions to such remark. In the second place they have had their own witnesses here, and the Court has permitted testimony here which has been all later than the time when this suit was brought, but I am not questioning, if the Court please,
120 the ruling of the Court, we stand by those, but the idea we have of it is the unfairness of allowing that——

Mr. Smith: Your Honor, we do object to the argument upon it before the jury at this time, it is a legal question.

The Court: I think it ought not to be done, that is all I care to say about it. I know that the case is an important one, and I have given it the best concentration that I can during the trial, and I have admitted such testimony as I thought is proper, and I have excluded that which I thought was not. Is there any statute in Iowa relative to that?

Judge Helsell: I do not know, if the Court please, of a statute which compels or says anything about that, but I do know that the universal holdings of the Iowa Supreme Court are that where a witness is upon the stand in his own behalf and has described his injuries, or had others describe them for him, that the defendant is entitled, and that is the holding of [*of*] our Supreme Court, and it is referred to in this case, and I have taken this case that was suggested by Your Honor because—I have taken this case in the 167 Federal and I have asked the questions in the very language and line of the decision which says those questions aren't decided by this case.

The Court: You know, Judge Helsell, and counsel for the other side knows, the grounds upon which that 167th was decided.

Judge Helsell: Yes, and in that case they held that the Court was wrong in excluding it.

The Court: Yes, I did exclude that testimony, I did it in view of the decisions of the State of Iowa and of the Supreme Court of the United States and the State of Iowa. A majority of the Court said I was wrong upon it, and wrong upon this ground alone, because he submitted himself to an examination in the presence of the jury and then tried to withdraw it, upon that ground and that ground alone.

(Argument continued. Jury excused.)

Forenoon Session, Wednesday, May 7, 1919.

The Court: You may go on gentlemen.

Mr. Smith: Your Honor, we rested last night with the exception of the reservation of that one matter, the Court remembers what that one matter is with regard to the attempt to serve a subpœna.

121 Mr. Houston however is not back to the city yet, the Deputy Sheriff hasn't returned so I am not ready with the witness yet.

Judge Helsell: Mr. Smith, when did you issue that subpœna?

Mr. Smith: Monday morning and an attempt to serve it was made Monday.

Judge Helsell: My information is that there was no subpœna issued for this witness until at present.

Mr. Smith: Well I will show that when the time comes; I don't know where you got your information.

The Court: He may be called later.

Judge Helsell: I made the statement last evening, if the Court please——

The Court: I understood you.

Judge Helsell: You understood that only an attempted service was all they expected or would offer as a further part of the evidence on direct examination. There was a request made last night, as Your Honor knows, will Your Honor let me give you my idea of this decision that Your Honor referred to and the discussion of these cases that were connected therewith. I may not agree with the Court, but it seems to me that there are two or three things that should be taken into consideration that are in answer to the suggestion of the Court that it was hardly possible to determine what would be done in such a case as that. It seems to me this case indicates——

The Court: Which case are you referring to now, the Kendall case?

Judge Helsell: Yes, and what the decision really decides.

The Court: In this case before us?

Judge Helsel: Yes, in the Kendall case I speak of.

(Argument continued.)

Mr. Smith: I will say professionally Your Honor that there were X-Ray pictures taken under the direction of Dr. Porterfield of Waterloo, who is one of the physicians and surgeons of this defendant, and that if they haven't those X-rays they have access to them, and that that examination was made. I will say professionally

122 further that Dr. Pond of this city, who I understand is a physician for the defendant, and who also happens to be a physician for the Compensation Committee, was designated by them to examine the defendant, and that while he took no X-ray pictures he had access to ours, and he examined the defendant in the presence of Dr. Killeen.

The Court: You say he did have access to your pictures?

Mr. Smith: He had access to our pictures and reported upon that—upon them as well as upon his personal examination, and

he, as I understand it, is one of the physicians, local physicians here of this defendant. Those two matters I don't believe there will be any question about.

Judge Helsell: There is some question about it, in the first place so far as Dr. Porterfield's connection with this defendant is concerned.

The Court: Do you mean the Director General of the Railroad?

Judge Helsell: I mean the Director General.

Mr. Smith: Let me ask you just one question, isn't he still acting in all the business requisite to his profession as he acted before the Director General took over these railroads?

Judge Helsell: As I understand it, if the Court please, the order of Mr. McAdoo was, and under that order with which the Court is familiar, all those that had been doing the work for the Illinois Central Railroad Company were retained in similar position for the Railway Administration.

Mr. Smith: Now, is he one of them that was so retained?

Judge Helsell: I don't know, I think he was.

Mr. Smith: And wasn't he so acting at the time he——

Judge Helsell: I don't know, I suppose he was.

Mr. Smith: He is in court isn't he?

Judge Helsell: I don't know.

Mr. Smith: He was here yesterday.

Judge Helsell: He was.

The Court: Did you confer with him yesterday.

Judge Helsell: I conferred with him, but I didn't ask him any such question as that. If the Court please so far as the pic-
123 tures are concerned that isn't the point, it is a physical examination of this man.

Judge Lenehan: Isn't the request that you have made to the Court here for this examination involved in it the taking of another X-ray picture, in the request you made.

Judge Helsell: Both were asked, either one could be granted without granting the other.

That the record may be entirely straight the request that we asked of plaintiff's counsel amounts to this, and we ask now an order of the Court to require the plaintiff to be submitted to an examination by reputable physicians to be chosen by the Court and the counsel upon either side, to take and make an examination of him personally physically, and apart from that we make the further request of the Court that the Court certainly does have jurisdiction, an examination of Exhibits "M" "N" and "O" being certain plates that were introduced in evidence here, and attempted demonstrations given to the jury were in the presence of the Court, and in the presence of the jury, and have been testified about by one physician. The plaintiff now having rested we ask that these plates, made in the presence of any officer of the Court, in the presence of any physician that the counsel on the other side desires, that the machine introduced here and the plates may be examined by such physicians as we desire, that we may shorten the time taken in their examination, and they may familiarize themselves with those pictures

just as the plaintiff's witnesses were permitted to do, plaintiff's physician was permitted to do. I think that will save time of the Court, and I would like to have the shadow machine——

The Court: Is there any objection to the——

Judge Lenehan: None whatever. They could have taken them last night, and they may take the exhibits and take any examination they want. You mean you want to have the experts examine this machine?

Judge Helsell: I want them to take the plates and the very machine that you took and look the plates over and give them professional examination. I don't care for the machine that took the picture, but I care for the machine that was shown to the jury, and I want several of these physicians to have an opportunity to do just what you did here yesterday, and to examine those pictures and then testify.

Mr. Smith: Perfectly agreeable to us.

124–126 Judge Helsell: In addition to the first.

The Court: Any objection to that?

Mr. Smith: None whatever.

Judge Helsell: I think if you let them all look at them at once and adjourn for ten or fifteen minutes that we could go right ahead with it.

The Court: That disposes of the matter?

Judge Helsell: That disposes of the matter of the machine and the pictures, but doesn't dispose of the other.

The Court: Very well, go ahead.

Judge Helsell: What is the ruling, I want to preserve the Court's record on the question of the examination.

The Court: I am going to overrule it.

Judge Helsell: We would like an exception saved.

The Court: I want to say if it becomes necessary to settle a bill of exceptions I want the record preserved as to what counsel has stated here as to the condition of that man on the examination that he has submitted to already, just what has been stated here in court.

Judge Helsell: I want a record made too, so we may as well [made] the record now.

* * * * * * *

127 *Defendant's Evidence.*

Dr. R. J. NESTOR, witness for the defendant, testified:

(Exhibit 4, (*a* to *d*) is marked for the defendant, being the hospital record.)

I am fifty-seven years old. Have been a physician for twenty-nine years. Got my medical education principally at the Iowa State University and in New York and post graduate school. Am located at Waterloo. Have been there for sixteen years. Was there in May and June, 1918. I wasn't in partnership with any one at the time. In the latter part of May I saw Mr. Dahn. He was in the wreck

at Aplington on the 29th day of May. I saw him at St. Francis' Hospital, Waterloo, in the hospital. I examined him physically while he was in the hospital. He had burns. Some cuts or abrasions on the forehead. I don't think there was any cut on his scalp. I examined those that I have mentioned. I don't recall any wound on his scalp. I examined the burns on both arms and on the chest, on the side of his chest. That is what I mean by burns on the chest. I examined those burns. I examined his back. At the time that I first examined him he had no contusion or swelling in his back. That was the morning of the wreck. I think it was on May 29th; I think 10:00 or 11:00 o'clock. There was no discoloration whatever upon his back. I recall nothing abnormal on his back. He had no loss of skin on his back. His back was in no way skinned.

In my examination, apart from the burns and scratches that I
128 have mentioned, I discovered nothing physically abnormal with the man. Saw him once or twice afterwards. Don't know whether he was up and around before he left the hospital.

Q. Do you think, Doctor that your examination was such that you would have seen any contusion or discoloration or injury at that time that was on his person?

This is objected to as leading and suggestive and a cross-examination of the witness.

Objection sustained. Exceptions taken.

Cross-examination:

I didn't discover anything the matter with his back. I recall no wound on the scalp. I examined him and made a general examination of him, all over. Examined his head; don't recall any blood in his hair. Didn't make minutes of his condition at that time. I am testifying from my recollection. At that time I didn't have charge of any patients in the hospital. I was directed to make an examination of this man by Dr. Porterfield. Was called in to assist in the work of taking care of these men who had been injured in the wreck; think there were eight or ten. Gave my attention to this man and two others, I think. I think it was about 11:00 o'clock in the middle of the forenoon that I saw Dahn. One other man that I examined was Mr. Dewey. I probably did some work for others, but remember these three men distinctly. Mr. Cleaves was another one. This was soon after these men were brought to the hospital. I can't say that Mr. Dahn's hair was matted with blood. He had a scar on his forehead. Don't recollect any scar on his scalp nor any cut. Didn't treat him for any on his scalp. Aside from the cut on his forehead, there was a slight abrasion of the skin, small abrasions on his forehead. The cut was over the right eye and I think there were some small abrasions besides that cut. That is all I recollect. I dressed that with gauze. Didn't put stitches in it. Can't tell you when that was done or who did it. When I first saw him it had been sewed up. That was not an

abrasion, it was a cut. I can remember no other cuts. His eyes were not black or discolored from a blow or anything of that kind. They were not. I made a general examination of his body. I knew he was in the wreck. I made an inspection of his whole body. He was complaining of pain. You could say it was great pain. He said the pain was in the burns. That was all. I didn't hear him say anything about pain in his back. I am sure of that. These
129 burns were on his arm, the back part. The principal burn was on his arm. That is where the deeper burns were, on both arms. They were blisters as large as your hand. I couldn't say how many. There were not burns along his right side. There were on his left chest. He has a good-sized burn on his left chest, I may say six or eight inches in diameter. That was on the left chest, not on the right chest. There were no burns on his back. I dressed the wounds with [paraffin] dressing. It is liquid dressing. When you heat it it liquifies. You take a brush and put it on as you do paint, paint it over the burn. Then as it becomes cooler, it becomes hard or stiff like glue. [Paraffin] is a semi-solid. You melt it and put it on hot. It melts about the consistency of paint. It requires considerable heat. There is some pain if you get it a little too warm. There was not any considerable pain in applying this dressing. No, sir. I don't remember that he complained of pain in the dressing. I examined his skin; the superficial skin was not rubbed off. There was no sign of any injury to the back at all. There was no fracture or displacement of any kind. I think the following day I made two visits. The next was on the second day afterwards. I think I saw him on the next day. I think there were others in charge of the case. He was not in my charge; he was in charge of Dr. Porterfield; that is, the general charge. I had charge of the treatment of the case. I know of no other doctor that had charge of the treatment. I didn't see him after three or four days. I am an Illinois Central railroad physician at Waterloo. Was at that time. I am continuing to act there under the Director General of Railroads. There are three other doctors there, Porterfield, Sigworth and Small, four of us altogether.

Redirect examination:

[Paraffin] keeps out the air from the wound. That was the purpose of putting it on.

(Witness is shown Exhibit [Bo.] 4.)

I have seen that paper before. It is a record of A. J. Dahn while at the hospital at Waterloo. It is kept by the nurse in charge from day to day or hour to hour, the patient's condition during the day and during the night. She makes a notation of it maybe every two or three hours, as to his condition. At the time I was there I had access to that particular paper and I always examined the record of the nurses in the hospital. The names signed there to the
130 record were the names of the nurses that had attended him day and night. That is the record kept from hour to hour of the nurses in attendance, made by them.

(For the purpose of identifying and in connection with the testimony of this witness alone as to his information, the times that he attended this party, the defendant offered Exhibit 4 in evidence.)

Recross-examination:

I didn't see this skiagram that was made of this man's back at the hospital.

Dr. J. W. Hall, examined for the defendant, testified:

I live in Chicago. Am forty-nine years old. Have been a doctor and surgeon for twenty-eight years. Began practicing at Bloomington, Ill. Practiced there nine years, then moved to Chicago. I was in charge of the Illinois Soldiers' and Sailors' Orphans Home at Bloomington for six years, an institution that had something like seven or eight hundred children. I have been in the United States Government medical service, a medical officer of the United States Army, during the yast year at Chickamauga Park, part of the time at Charleston, some of the time at Washington, all of the time in the Southeastern District. I was medical officer at Oglethorpe, Ga. At one time we had something like seventy thousand troops at Chickamauga Park. That is perhaps the greatest number when I was there. Demobilized and sent over the sea. At Hospital No. 14 we ran from 600—14—15,000 patients. My connection was director of the ward for nervous patients, referring particularly to nervous conditions following injuries. Had general supervision. In addition to this I had a military connection with the management of the Camp. I have had experience in reading X-ray pictures, taking and construing them, ever since they commenced making the pictures back in 1897 or '8, particularly starting along 1900, when I started my work in Chicago, and for several years last past have had an X-ray laboratory. Have taken a number of pictures myself. I have an operator in my laboratory. I am not entirely familiar with the technique of making pictures outside of the mechanical appliances, but I have read practically all that were taken; in addition to those have read many other pictures while on the staff of the Cook County Hospital, where we have a great many injured people taken. It is a constant practice there that we do not treat any fractures without taking X-ray pictures, and in this way I have seen and read and interpreted a great many
131 X-ray pictures and plates. I would say they run several hundred a year. While in the army at Oglethorpe we had a great deal of work in that line. We had a large school of radiology there and I read a great number of pictures in my private work and in connection with the City of Chicago, where for seven years I had charge of the public injured in Chicago, and we took a great many pictures and made personal examinations of men and also of the pictures. I have had a fair chance to learn the human anatomy. I had the usual course in college, in which we dissected all parts of the body repeatedly, and had lectures. Have had my own personal experience

in the hospital work since I have been practicing, in which I have made a careful study of anatomy. I took my literary degree at Georgetown College and then in the Medical Department of the University of Kentucky; graduated there. Took a post-graduate course at Rush. Since that time have taken short courses, both in surgery and medicine, in private and public institutions. In addition have taught for a number of years. The bones are the solid parts of the body that give form as well as strength to the body. The spinal column is a column of bones, one above another, very well illustrated if you will take thirty-two spools and put it on a string; where one spool rests on the other represents the joint between the spinal vertebræ or the bones. Those bones are technically called vertebræ. There is thirty-two of them extending from the neck down to the buttocks. The part involved in the questions as I get it is the part known technically as the lumbar, sacral and coccygeal. The spinal column is divided into several sections anatomically is called the—this one on to the ribs is called the dorsal region, and just below that—the last ribs stop [ehere] you feel these little floaters in the side, in the small of the back, are technically called the lumbar region. There is five segments of bones involved in making up the lumbar region of the spine, one on the other. Those bones are rather a peculiar shape, more or less difficult to describe, they correspond almost exactly to the back bone of a hog, so the back bones of spare-ribs that you eat, you get a very good idea of the bone of the human being. It is a large bone with a hole through the center, approximately the center, with fangs out, three of them. There is one on either side and one on the back. The ones on the side are called transverse processes, simply a process of bone that sticks out on the side; it really is a rudimentary rib, the ribs stop, but still have those little fangs out that correspond to the place where the ribs are, at the place where the ribs properly are attached. There is
132 three of those. There is a cavity down through the center of that body that contains at this particular region large nerve trunks. The spinal cord proper stops above the lumbar region, as it approaches the lumbar region. Below this lumbar region the five segments of bone, is a large wedge shaped bone, the largest, the heaviest and thickest bone in the body, called the sacrum. This is made up of four, sometimes five, segments in early childhood, that later in life the parts of the surface of these bones ossify and it becomes one large, wedge shaped bone which forms the large part of your back between the hips. This hollow position that you can feel in your hand is right over the sacrum, which is a large, wedge shaped bone which forms the base of the spinal column. It is the base upon which this column of bone sets. It finally carries your head and upper structures and upper parts of the body. In addition to forming the base of the spine it forms the back part of the pelvic cavity, it is the back of the cavity. It sets in between the hip bones, which come around, circle around and form a bucket shaped bony cavity, and this sacrum, which is the base of the spine, is the back part, or posterior part, of that pelvic cavity. On either side of that

sacrum the hip bones fit and form what is known as an articulation with the hip bones, the side bones [tec*k*nically] known as the sacro-iliac joint, which simply means an articulation between the sacrum and the ilium, and you get your compound word sacro-iliac, making the sacro-iliac joints. Two of those, one on either side. These large bones come around—that you can feel the top of them, the top of the hip bone, pelvic bone come around and join in front just above the —, or in the male just above the penis, coming together forming a joint at that point, and make a complete circle, or a bucket shaped bony cavity. These joints in adult life are practically immovable, I mean by that they have no play or motion ordinarily in a normal condition. In younger life they have a substantial motion, and often in women, in the female bearing children, these bones are permitted to open up more or less for the passage of the head of the child as it comes out. So it is a joint formed in front corresponding very much to the joint at the point of your jaw, your two jaw bones come around and come together, there is a joint right in the center. Now that joint is fixed in the adult life; in the child it is somewhat movable, but it corresponds very largely to the bones that come together in front below. There is two large bones that go to make up the sides of the pelvis called the innominate bones. In early
133 life that bone consists of three bones on a side, or six altogether. They have technical names that even doctors forget sometimes, they are the ilium, the ischium and the pubis, three bones on a side, six bones. Now then that, or joined to that pelvis from below is the leg bone that comes up, enters the socket in the side of the hip, ball and socket joint, on which the weight of the body is carried. The pelvis is a connecting link between the trunk and the weight of the body and the lower extremities that carry it.

In the pelvis contained in this bony cavity in the male is certain organs, the bladder in front with the stem of the penis coming out from the bladder, through which you urinate, lies right back of the front part of these bones in the cavity. Back of that is the end of the alimentary canal, commonly called the rectum, that lies right back of the back part of this cavity right in front of the sacrum. Then the intestines fold and fall down over the top and fill up this bony frame in the made individual. Of course in the female the generative organs, the uterus and ovaries and generative organs, are contained in it.

Q. Doctor, explain to the jury just how the bone of the leg fits above and to what bone it joins?

A. The leg bone, thigh bone, or technically known as the femur, comes up, it is a shaft bone at the top, it has a neck and a head, it comes up corresponding very much to my arm, this being the shaft, and the knee up here, it comes up to this point, and then turns almost at a right angle and goes over to the hip bone, and this is the head, here the socket, fit into the side of the pelvic bone, forming a ball and socket joint.

The head of the femur fits into a socket joint and bears the weight of the body. The ilium is a wing shaped bone, flaring out from the

side of the pelvis, that forms the top of the bucket. It is a large flat bone that articulates with the sacrum, and below and externally with the femur, and it joins below the ischium and the pubic bone. The head of the femur fits into the socket of the pubic bone. The ilium is one bone on one side, and when you call it iliæ, that is the plural.

I have a perfect illustration here in a miniature cut of the anatomy showing the structure of that portion of the body. The pelvic bones are directly involved in weight carrying and motion. It controls locomotion and weight bearing.

(Exhibit 5, an anatomical chart, is identified for the defendant.)

134 The Court: That is the right figure is it?

A. The one on the right hand of the picture, yes sir. The middle photograph is a picture of the skeleton taken facing the camera. This shows the normal condition of the bony frame of the human body, the number of bones as clearly as you can. There are a number of bones of the human body which the camera won't even show, some bones inside of the head, for instance, that you can't even get with the camera. This shows clearly the articulation of the femur with the pelvic bone, this front picture. I call your attention to the right leg and the shaft of the thigh bone is outlined clearly, and at the top of the bone you have a right angle off approaching the center of the body. At that point there is a large protuberance or enlargement of the bone, that is the bone you feel on the side of the hip down at this point. As you move your leg you feel that bone move, called the greater trochanter. That is this part of the bone illustrated here. It is also illustrated on the other leg on this same picture, and on both legs of the picture that is taken from the back. The large piece of bone that is seen at that point, at the top of the femur.

Now turning off from that there is another short shaft, about an inch and three quarters, or two and a quarter inches long, that is called the neck of the femur. That is the part of the bone that runs off from the shaft that makes the head of the femur. The head of the femur is this round ball like object that you see after passing the short shaft, is a round ball that fits down in the socket. You will observe on the picture that is taken from the back, the head of the femur isn't disclosed because it is taken from such an angle that it is covered by the socket. Taken from the front view the socket is exposed to a direct ray of the camera and the head of the femur is shown, this round ball object over here is the head of the femur. The fangs that you see, these little objects on both of the pictures on the lower part of the spine are the parts of the bone under consideration in this case, called the transverse processes. They are those little tips of bone that stick out on either side. The bones within and part of the spinal column have them; they carry the ribs, those that reach the breast bone, and some that they don't; below there is a corresponding little tip of bone that starts out from the spinal vertebræ that only go out a very short distance; between each of these is a joint. These are segments of the bone that are shown here above

in the picture from the back. Particularly in the neck you
135 see one on top of the other. Inside of the back of the pelvic cavity at the bottom of the spinal column in the picture taken from the front you get a good outline from the sacrum, which is this large wedge shaped bone right in the center. It has perforations or holes on either side to receive nerves and blood vessels. This is the sacrum coming down at this point. This one shows the back part of the sacrum and a part of the coccyx, commonly called the tail bone, the last of the spine.

Q. Point out the iliæ, Doctor?

A. The large wings, the wing like objects that you see on either side is iliæ, this being in this case the left iliæ and this being the right iliæ. It comes down and forms a joint with the sacrum, passing over here and forming a socket for the femur or leg bones that joins in the patella below that. The point shaped bone that you see in the picture on both sides are the ischium, ischiæ. Those are the bones upon which you sit when you sit in a chair; those are the bones that you rest on, above and in front, it isn't very well shown in these pictures, and cannot be shown very well because it had to be taken by a direct view. Just above the ischiæ then at that point the pubic bones come around and form a joint right in front of the body in the center. In this formation these bones are not of regular form and type, you find no two skeletons that are exactly alike. You will observe in this case that this process here is crooked, neck down; this is very much shorter than the one on the other side, this one turns up and the other one down as they do on this side. They are irregular, just the same as you never see two men with a nose exactly alike.

Mr. Smith: You are speaking now Doctor of the transverse process?

A. These transverse processes of the lumbar vertebræ. And that is also true of the body of the vertebræ; it is also true as to the number of vertebras, all men haven't the same number of spinal vertebras. Often times there is a wedge shaped piece found on one side that tilts the body. One born with too much it forms a wedge and gets over to one side and pushes the body over to one side and produces spinal curvature. In there is the pelvic bone, the same shape, the ischiæ, the ilium. Those bones are not always arranged the same. We use as standard the most nearly perfect.

At this time the Court took a recess until 2 o'clock.

Court convened pursuant to adjournment.

136 Afternoon Session, Wednesday, May 7th, 1919.

Dr. JAMES WHITNEY HALL, continuation of examination in chief:

Q. There are nerves and blood vessels that go down to the legs do they Doctor?

A. Yes sir.

Q. Explain to the jury where they go through to reach the leg?

A. You have in mind all the vessels?

Q. Nerves, blood vessels?

A. Yes sir. The heart is located about in the position here from the third to the fifth rib on the left side slightly. The large artery that comes off from the heart descends carrying the blood down, and follows the course of the spinal column until it gets to about the top of the pelvis, and then it is broken up into different blood vessels and have different names and terms, and there are very large trunk vessels come from the pelvis supplying the pelvis and the bladder and the rectum and the tissues, and then escape from the pelvis and form a very large blood vessel that carries the blood down either leg. The same is true——

Judge Lenehan: Pardon me, whereabouts now in connection with the pelvic bones and the ilium does that come through?

A. It comes through the obturator foramina, foramina means a hole. That opening is practically as large as the circle formed by my thumb and fore-finger. That is divided into sections by strong bands that go across, and these big blood vessels that [comes] down comes through this notch and comes around below the groin and takes a course down to about the knee, and separates there into the internal and external polpliteal. Those technical terms only describe part of the anatomy that they go by, and supplies all of the leg with blood, all of the foot.

Q. Now the nerves?

A. Of nerves the same thing, there are several large nerves come out from the pelvis. The large one is the sciatic nerve, that is the nerve that is effected with sciatic rheumatism. It comes out there, made up of different roots or nerves that come from the lumbar region, lumbar and sacral region of the column roots of nerves, anterior and posterior roots; nerves come off from these segments, or between the segments and form what is called the sacro-sciatic cord
or root, and form the large sacral and sciatic nerves that de-
137 scends down the leg and into the junction with some other
larger or smaller nerves that come out through these same openings and give nerve supply, both motion, sensation and nutrition to the tissues around the pelvis, and to the legs below the pelvis, including the genital organs, the skin and muscles, etc.

Q. Now are these—What is between the pelvic bones and the ilium bones, or the iliæ and the outside skin?

A. I am not sure that I quite get your question, I am assuming that you want a description of the tissues under the skin and over the bones.

Q. Yes.

A. Well, that consists, first start from the bones out, starting from the interior and coming out, of cartilages between the bones, forming a kind of a pad or substance that forms not only a pad, but makes an attachment binding the bones together. These joints are bound together securely and very tight by an [introarticular] cartilage or ligament, by that I mean a cartilage or ligament between the joints, that is fastened securely to the one, to the one bone and also to the other, that holds them down tight together, that is a cartlaginous

ligament, the largest and strongest one in the body is in the sacro-iliac joint.

Q. The sacro-iliac joint is just where?

A. The sacro-iliac joint is the junction between the ilium, this large wing bone, and this large wedge shaped bone, they come together and between those bones is this sacro-iliac cartilage or ligament. That is between the ends of all bones that come together there is a cartilage. It is a semi-ossified tissue up to a certain age, and in very old age is completely ossified. I mean by that that it turns to bone, ossification, turns to bone. And in a child it is soft and elastic, and in the middle age it is firm, and in the old age it frequently becomes bony tissue. And doctors entitle that intra-articulary, or between the joints. In this region particularly is very large tendons or cables so to speak, that come over and around these joints and bind them together very substantially, so substantially that in the dissecting room attempting to separate these bones it is done by a chisel. We can't do it with the ordinary dissecting knife they are so firmly bound together. Frequently in dissecting in trying to open up those joints it is necessary to fracture the bones in order to get them apart they are so firmly bound. The ligaments of the pelvis consist of ligaments, not only in front, but behind and around, and they are large and strong and substantial that hold those bones together, and still give the bones proper play so we have the
138 proper motion. In addition to that all these bones have muscular attachments in the form of tendons or cords at the end of a muscle where the tendon grows right into the bone making a firm muscular attachment to the bone in addition to ligaments. These tendons hold the bones together and exercise the function of moving movable bones. Besides the ligaments and besides the cartilage, ligaments and tendons there are very large substantial muscles, both inside and outside this bony cavity. The pelvis forms a bony cavity. Now inside of that cavity, if you can imagine a bucket with cords running back and forth, through and around, large muscles that have their attachment on the inside and cross from one bone to the other, large muscles that have their attachment on the inside that come through the large openings in the pelvis and descend to the side of the leg, and to the buttocks; the large buttocks muscles have their origin on the inside and outside both, and there is large muscles that come down the side of the spine, very thick heavy muscles that [corresponds] to the tenderloin in the pork, in the hog, the big muscles that you get along side of the spine, it is the heavy, thick muscular tissue that comes down from above and descends to the opening into the pelvis and forms an attachment on the outside of the opening. With these muscles, surrounding muscles, there are fastened a thin strip or covering to separate the muscles. In addition to that there is more or less fat or adipose tissue, and then all the whole substance is covered by the skin that gives form to the body.

Q. Referring now Doctor to that sacro-iliac joint which is somewhat in question here or has been, describe that attachment more

definitely and specifically if you can and the extent and nature of the strength of it, and its consistency at different times of life?

Judge Lenehan: It seems to me that has been fully gone over, I don't know that the witness can add anything additional to what he has said.

The Court: If he can add anything more to it, let him go on.

A. I think I could probably explain it more, that there is three large bony cavities in the cavity, the head, the chest and the pelvis. The pelvis is composed of the large, most substantial forms, the heaviest muscles and the heaviest ligaments of the three large bony cavities of the body, the largest and the heaviest joint and the largest and most substantial bones is the sacro-iliac formation. The
139 sacrum is the large base of the spine that I described this morning as the base of the spine. On either side of that there is an attachment something like the knuckles fitting in together that way, kind of a tooth arrangement, so that they cannot move up and down unless they jump out of their attachment. And these attachments under these are these strong ligaments that hold them down together. Then on the outside are large ligaments, and across this way, and on the inside, bound down so that it is easier to break a bone than it is to dislocate that joint. It is possible to break that joint. The fact is that joint can only be fractured by a penetrating violence like a gunshot wound or the stabbing of an instrument that comes in and tears them apart, or a crushing violence like the kick of a horse with the end of a shoe which goes against the solid process on your back. The local effect of separating that bone by one act of violence is to fracture the bone, tear the ligaments, break the blood vessels, sever the nerves, cause profuse hemorrhage, with marked evidence of injury on the surface, such as swelling and discoloration, and in addition to that great shock, complete disability, disabling immediately, with such a condition of injury to the parts that it would require a great number of months for even partial recovery. In addition to that there would probably be a tearing of the contents of the pelvis which would require an open surgical operation to repair them. I think a man could, if he could endure the pain, move his legs while off of them; I mean that a man placed in the proper position physically might move them. His legs would not necessarily be paralyzed, but it would leave no weight hearing function. The power of locomotion would be absolutely destroyed, not only immediately, but for many weeks or months following an injury of that kind. It would prevent his walking. It would be an immediate manifestation and an immediate appearance of severe and serious injury in the region of the pelvis. The incapacity or disability would occur instantaneously with the accident. The man would be down and out, would be unable to walk at all. These indications would take place immediately. The movement of the legs would greatly increase the pain. There would be power to move the legs, but it presents a peculiar picture. The legs voluntarily are drawn up more or less towards the thigh because it relieves the tension. The tendency is to lie on your face. It is almost impossible

for a patient with a fracture in that position to lie on his back without a special appliance that allows him to so the hips will come on this space and the middle part of the back or spine be relieved from pressure. They get their only comfort by lying on their belly.
140 It is impossible to fix anything like a definite time when he could walk. I should judge the minimum time would be a question of months before he would be able to ride in a vehicle. In sitting down you would come on those bones that are directly connected with the part being discussed. All the large nerve trunks come up through there. The pain would be excruciating. It would be the last thing a man would do. One of the first things a man could do would be to go on crutches throwing his weight on his shoulders, but sitting down or riding would be the last thing a man could do with that kind of an injury. It wouldn't be possible within several months for a man to ride in a buggy or vehicle. He couldn't walk without crutches earlier than from five to twelve months with those injuries. As to the effect of dislocating the processes of the lumbar vertebræ, would say, that there is no joint between the spinal process and the body of the vertebra, hence you can't dislocate them without you break them off. The immediate effect would be a laceration and tearing of the muscles and tissues around them. It requires direct violence that comes along the side and scrapes those little fangs of bones off. The effect would be a tearing and laceration of the tissues. If they are broken and pushed aside, the effect would be to displace the fragments, and when the soft parts healed up, the muscles, etc. that were torn, there would be no effect so far as the function of the spinal column is concerned. If one or more of those protuberances called processes is broken, and it is shown that they are healed up, the effect is that the man is well so far as those processes is concerned. It would have no effect on his movements. This box in which the pictures are put is called a shadow box. It is merely a machine to throw light on the picture. I examined Exhibit "O" this morning with care. It is a representation of the lower part of the spine and part of the pelvic region. The iliac bone is shown in part. It is a fair picture. It might have been developed a little too much. Obviously there is a good deal of gas in the intestines that has thrown dark lines across the picture at different points. The sacro-iliac joints are not very well shown here. If this picture was taken with the film side up, this is the right side; if it was taken the other way it is the other side. There is no way of telling. The only way you can tell which side it is is the one who takes it, because if it is turned one way it is the left side, and if it is turned the other way it is the right side. If a man is normal, it will show the same lines on both sides. We call this the right side, the other the
141 left side. This is the line, posterior line, of the joint between the sacrum and the ilium. Below and in these spaces this dark outline you see around here is a part of the pelvic cavity that is filled up with guts, and in many instances [there] are full of gas and matter that is throw—They are not as dense as the other part of the tissues, hence throw dark shadow on the glass. This is clear bone here because there is nothing back of it, it shows it very light. Even

in this part of the picture there were intestines in front of the bone, and some gas. That is why the ilium shows lighter than the spinal column.

Q. Now, Doctor, looking at that picture, what would you say as to the fact as to whether or not that picture shows any fracture or separation of the sacro-iliac joint or either of them?

A. This is what we call a negative picture, it shows no abnormal marks or lines whatever. The lines are alike on both sides, showing no sacro-iliac separation. The lateral processes on both sides of the vertebræ that is shown is intact, and shows no line of fracture, or no line of callous where there has been a fracture. That spinal process on that vertebra has never been broken.

Q. In what color, compared with the picture, would a fracture be, light or dark?

A. It would be a dark line always, with the bare exception in children. Callous becomes as dense as the normal bone in time, but in an adult that has a fracture the line of the fracture always shows on the picture, because the callous that repairs the bone in an adult never becomes as dense as another bone, hence it would be a dark line, the rarer the tissue the darker the shadow.

Q. So, what do you say, Doctor, as to whether that picture Exhibit "O" shows any fracture of any transverse process or any fracture of either of the joints in either of the ilium?

A. The only transverse process that is shown on this is the fifth and sixth lumbar vertebræ, and the fourth is only partially shown, because the picture is cut off, the fifth is shown intact and normal, the fourth is shown intact and normal so far as it is shown. There is only about half of it shown, the segment is cut off by the end of the glass.

Q. In regard to both the sacral joints, and the what-do-you-call-it, what is your testimony as to whether or not there is any fracture shown in that picture of any bone?

A. There is no fracture shown in that picture, sir.

142 Q. Or any separation of bones?

A. There is no abnormal separation.

Q. By abnormal you mean——

Judge Lenehan: Let him tell what he means by that.

Q. You mean what?

A. I mean that the separations shown there are normal and natural to a healthy individual.

Q. Reversing the picture and showing just the opposite side, what do you say as to whether or not there is any fracture of the transverse processes or any veretbræ, or any fracture of the joint called the sacro-iliac joint on either side?

A. On the side of the plate it is the same as the other exactly. It shows the transverse processes intact of the fifth lumbar vertebræ, and a part of the fourth. It shows the lines between the sacrum and the ilium. It shows the obturator foramen partially. It shows the entire sacrum and the tail bone or coccyx.

Q. Is there any separation or any breakage of any pelvic bone, or disunion of any pelvic bone with any other bone?

A. No sir.

Q. What do you say as to whether or not there is any separation or breakage shown in that picture of anything?

A. That picture is negative.

Q. What do you mean by that?

A. I mean that it shows a normal condition of the pelvis of the human body. The man was lying a little crooked when it was taken, he was tilted to one side slightly, but not sufficient to destroy the normal anatomical land marks.

Q. Now Doctor, calling your attention to the picture in the shadow glass, Exhibit No. "M," is that one of the pictures that you examined?

A. Yes sir.

Q. Now you may state whether there is anything whatever in that picture that shows any breakage, fracture of any joint or bone?

A. That picture shows the lower spine very well. It is a good picture with the patient lying straight, and such spinous processes as are shown there are shown to be normal, and there is no line at any point on that picture indicating that there has ever been a fracture. There is no fracture mark on those pictures of the spinous processes. There is a shadow shown at the right side of the fourth lumbar vertebra that very faintly shows that process at all, they almost appear absent on this vertebra, you can see just the slightest shadow of that
143 other side. The same is true here. The dim shadow of this one. And those things are all accounted for by the substance through which the ray has to go. This picture is taken about that location, just about that high. Just about in that position is where the rays would hit this man to get such a picture as this; more in this position. Now you have to go through a lot of substance especially if a man is fat, you have got his belly wall, all the muscles, and underneath that would be the intestines or guts, full of fecal matter, and more or less varied in the consistency, in some instances it is soft and semi-liquid, and in others there is a good deal of hard substance that the ray has to go through before it comes to this bone, so in that way you frequently get some shadows, but so far as the bones show that is a normal picture, such a picture as you would get from any of the jury or yourself if you were put under an X-ray if you had never been injured.

Q. Now turning to the other side of it Doctor, or Exhibit "M," what do you say as to that picture?

A. Shows the same thing exactly, simply reverses the situation. Another thing that this shows that is interesting is that these—the top part of the joint between the sacrum and ilium is brough out very clear in this picture. Here are the joints here. This is the anterior one, this is the posterior one, and this is the interior one. This is the posterior one here and this is the anterior one, showing them uniform, straight, lying in the proper position. In that regard it shows better than it does on the other picture. The sacro-iliac joint is absolutely uniform and intact, there is no relaxation or bending back on itself. It fits properly up against the sacrum in

line with the spinal column in this picture in which the man was obviously lying straight and not tilted to one side.

Q. Did you answer my question as to whether there was any showing——

A. There is no showing of any fracture of the spinous processes, or any other part of the bones that were taken in that picture.

Q. Calling your attention now to the picture Exhibit "N," the largest picture that was produced here, have you made a careful examination of that?

A. Yes sir.

Q. What do you say as to whether that picture shows any proof whatever of any fact as to any breakage of—or dislocation or separation of any bones shown in the picture at any place or of any joint at any place?

A. It does not.

Q. Is there any separation anywhere indicated there of an abnormal separation of any joint?

144 A. No sir, the joints shown in this are the joints between the segments of the spinal column and the sacro-iliac joint, they are all intact and in normal position.

Q. Showing you now the reverse side of the same exhibit I will ask you whether that picture discloses any fracture of the transverse vertebræ on either of the lumbar vertebræ or any breakage, or whether it shows any fracture, separation or disunion of any sacro-iliac joint?

A. It does not, that is the picture of a normal pelvis and spinal column of the human body.

Q. Doctor, in making these examinations as you have and in making pictures as you have, and your knowledge of the matter, what do you say as to whether or not either intentionally or unintentionally a false impression can be given to a picture by either ignorance, intelligence, fraudulence or honesty?

A. I assume that you mean is it possible to make a normal condition appear abnormal by taking the picture a certain way?

Q. Yes.

A. Yes sir, that is very true. It is the same process exactly as photography, and the position of the object, the direction of the ray, the distance of the ray from the object, and the obstructions on the ray before it approaches the object, or the movement of the object while the rays are turned on them, may produce a very different picture, a picture with a very different appearance to the actual normal representation of the object that is taken. It is comparatively easy with an X-ray to show lines that don't exist, or to obscure lines that do exist. Perhaps no better illustration than the taking of the pelvis. The pelvis is this cup; if the ray is directed right directly at right angles with the bottom of this cup the lines on either wall will show exactly the same. If my hands were held in that position and the picture taken the ray exactly at right angles and the fingers exactly in that position and the thumb in the same position both hands would show exactly alike, but if the ray was off to the right it would give the angle of this hand and hit this one directly in the

center, it would show the space between those fingers, it would show the space between the thumb, show the space between the palmar bones, and in this hand it would show them in line, without showing any space at all, so the lines between my fingers can't be distinguished if the hand was taken directly to the angle, at a right angle with the fingers, but if you turn the ray around and take it from this position you get the spaces between your fingers, so it is an easy matter to divert or change the appearance of an object by the changing of the process of taking the picture, exactly like a man's shadow from the sun at the noon hour when the sun is right over him is very short, and late in the afternoon when it is hitting him on the side you have got a shadow twenty feet long, that is the whole story, it is the position the ray hits you, it is the angle and size and positions and the space between objects and all is modified by that process.

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I have handled a good many cases of burns. All burns must affect the cuticle. Where it affects the cuticle only, it is called a burn of the first degree. It irritates the skin, doesn't cause a blister, causes a great deal of pain because the skin is sensitive. That is a burn of the first degree. A burn that affects the second layer of the skin, the cutis, is a burn of the second degree. Third degree is where it burns down into the deeper tissues, into the muscles, perhaps into the bones. A blister shows a burn of the second degree. That is a separation of the two layers of the skin filled up by a serum which is commonly known as a blister, but you may get it from many other things besides burns, but it is the same pathological condition. You can pick them and a liquid comes out. As a rule that does not penetrate the third part of the skin. It is not of a permanent character, does not leave a scar. If it covers a great deal of the body, it becomes a serious matter; where it is confined to a small part of the body, the only disturbance is the pain and discomfort. These blisters heal without scars. If the burn penetrates the third degree, it will leave a scar in all events, and the extent of the scar will depend upon the amount of the tissue that is destroyed. There are two layers of skin. If it burns down through the second layer, that will not show a blister. I want to qualify this, however, by speaking of an electric burn, which is entirely different from burns from direct cautery or steam or hot substances other than electricity of which I have been speaking. The electric current seems to kill the tissues, and while a surface burn of the first degree may amount to nothing original, in the case of electric burns the tissues frequently die and slough out; that is a more serious matter than an ordinary burn.

Cross-examination:

There are many things that modify the healing of burns. Infection would be very important. If a burn lasted several weeks, it would probably indicate a second degree burn. There are so many suggestions made by different doctors as to treatment that it is hard to give any certain treatment. They treat it differently. I think the most generally recognized treatment is

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to exclude the air by some covering. A large branch of the profession now believes in exposing the part to sunlight and air and putting no covering on it. Many use that treatment, or did. The treatment differs with the degree of the burn. If covered with blisters, I would advocate excluding the air until the surface is healed underneath. I would think that in three or four weeks a second degree burn would heal so as to remove the dressing, and if not healed by that time, would suspect infection. I would not keep that covered; I would have drainage. If it continued five, six, or eight weeks, I would think more strongly with a second degree burn that that was not the proper treatment. Whether it would be any indication that it was a third degree burn would entirely depend upon the treatment it had had. Of course a third degree burn recovers much more slowly than other burns. The old treatment is lime water, linseed oil and absorbent cotton spread in layers over the parts, with a dry bandage thrown around it. That is used a very great deal yet. The most modern covering is a [paraffin] dressing. I think many in our profession do not believe in that. It does not act as an irritant. It is applied very warm; not warm enough to burn the tissues. I think it would be uncomfortable. It has to be kept heated until applied. If the whole body was burned I would not dress it with a [*praaffin*] dressing, I would send for an undertaker. It is pretty substantially established that if one-third of the body is burned it terminates fatally. That is not on account of the burns, but owing to shock and the disturbance of elimination. By ordinary manipulation you cannot feel the spinal processes very distinctly. It is extremely difficult to feel the transverse processes. They may be felt in the small of the back under the ribs where you can bear your fingers into the back bone, but it is difficult. In fact, you cannot injure them without injuring the soft part first. They are protected and covered by muscles and by tissues and skin. It requires either penetrating violence, or if it is external, it requires a crushing of the tissues over those bones in order to break them. The soft part would be mashed and torn. A crushing blow that would break four of them would have to be extremely great and in a very peculiar direction to get four of them. In my opinion it would simply tear the whole tissues away from the side of that column, which would be followed by extreme hemorrhage and great swelling. It would take a great deal of weight and direct
147 violence. These projections vary in the male in thickness and they vary in the same individual, different vertebræ. There is no uniform size of the spinal processes, ranging from ¾ of an inch to 1¼ of an inch, some of them as short as a quarter of an inch or a half inch. They vary in different parts of the spinal column. I should say at some parts of them they are 1/16, some parts ¼ inch. I have seen cases where they reunited if a surgeon saw fit to wire them and bring them back into their places, but that is never done. I seriously doubt if they would reunite themselves unless a surgical operation had been done and cut down to them and the fragments of bone brought back to place and fixed there. I doubt if they would grow back together because the tendency of

the ligaments would be to pull them out away from their natural position. I have never seen a case where they reunited except in connection with fractures of the body of the [vertebras]. It is very hard to conceive of four of these, or even one of them being broken off without breaking the body of the vertbra-. There would probably be serious injury to the body of the vertbra-. If they were broken, there would be great and severe shock, a tearing and laceration of the nerve filaments, the nerve branches that run off from those parts would be torn and there would be pressure followed by congestion, which would cause great and severe pain at that point and on the general nervous system. It would depend entirely upon the temperament of the man. I don't think those bones could be broken without tearing the tissues. I do not think it is possible. In my opinion it is impossible to tear those fragments of bones off without tearing the outside tissues; it would take a very peculiar force, applied in a peculiar way to tear the soft parts far enough to break the bones off. I don't think there is any doubt about it at all. My opinion is absolute. The bones of the sacrum, the pelvic bones, and the joint between the sacrum and the pelvic bones are connected by continuity; that is they are part of the same bony frame, and in an adult practically the same bone of the whole pelvic side. They are connected by joint with the sacrum, the bones upon which you sit. The ischium is really a part of the ilium and pubic bone. They all unite so you can hardly tell where one stops and the other starts. They are originally connected by cartilage which becomes of a harder substance. It depends upon the age of the patient. In adults the cartilage between the union of the ischium and ilium and pubic bones disappears entirely. It becomes ossified. It is of the same character as the bone. In the pictures there is no connecting joint between these bones. That
148 *that* I pointed out is the sacro-iliac joint. That remains.

Its character is changed; in early life, there are three bones on either side of the pelvis. Now they join on to this pelvic bone, this sacrum bone, on the side. There is always up to very old life, and in most individuals for the entire life, a cartilage remaining between those segments of bones. There is always a joint there. It is semi-ossified in old age and the cartilage becomes very old, but it still retains some of the animal matter. That varies in density. In some individuals, where they develop hardening of the arteries and hardening of the tisues, it becomes harder, more dense, than in people who stay young while they are old. It becomes fixed, almost immobile. That is the line that I pointed out down between the sacrum and ilium. In different individuals it may differ in size, just as one man's mouth may differ from another, or the size of his ear. This joint may be separated by a chisel or mallet or such violence as would crush the bones and break them. That is the only way in a normal individual that it can be done. I never tried to separate them except in a corpse and that is what we use. I think it would be possible to take a cleaver, such as butchers use if you wanted to do it, but then it would be a difficult matter. I have separated a number of these joints. Relaxation of

the part may take place by disease. Long persistent anemia, tuberculosis, or general infection may make them become loose and lax. These bones are stuck together very tight with a cartilaginous ligament between them and then on the outside you have these heavy ligaments. In case of relaxation by disease sometimes a separation of those parts is caused. The ligaments are very hard, the cartilaginous ligaments between those bones are exceedingly tough and difficult to separate in a normal individual. Disease is exactly what does affect the cartilage as well as the ligaments that cover it. It is softened when it is relaxed and it is not uncommon to find local tuberculosis in that joint. In many instances it is cut down and the joint opened up, the same as you have tuberculosis of the hip joint. That is the way you get your separation of the sacro-iliac joint, not from injury. The ordinary thickness of the sacrum varies, I would largely guess, from 2¼ to 2½ inches at some points, at the top, and it shades down; where it comes to the coccyx it becomes very much smaller, practically a quarter of an inch thick, from front to back. I would say from a quarter to a half an inch. I don't remember of ever having measured it in my life. The bladder is possibly 3½ to 4 inches from the sacrum and between the iliæ. The bladder is not a fixed organ. When it is full of
149 urine it is pushed back against the sacrum except for the tisues in front of the sacrum. The bladder is in front of that. The rectum extends some six or eight inches, some four or five, even higher than the sacrum. It is possible that the bladder when full is closer than 3¾ inches to the sacrum. Lying on the back would have a tendency to change the position. In a case where there was a fracture or separation of a joint, there might or might not be injury to the bladder. If a man had an injury and his bladder was injured by that injury, I would of course say that the injury caused it. I can see readily that the bladder might be injured if there was a crushing injury and the bones displaced. Whether he would suffer more sitting than lying down would depend upon how he was lying. I think he would suffer either way, standing or sitting. On account of the pressure on his bones from sitting there would be pain in sitting. If a man was suffering pain, more pain while sitting than standing, I should suspect injury to his coccyx below the sacrum. The coccyx has no connection whatever with the ilia. Does not touch it either by continuity or contiguity. It is entirely a separate bone and touches the bottom part of the sacrum only. The coccyx is connected with the sacrum, the sacrum with the ilium by cartilaginous ligaments. The cartilaginous connection is the only connection. In old age it become almost bony tissue. Traumatic neurosis is a nervous condition resulting from an injury of a type that does not recover immediately. It may be to any part of the body. It has an effect on the nervous system. It is for all practical purposes proper to say that neurosis is produced from injury. There is a nervousness from any kind of an injury giving pain. Any kind of an injury, such as a stick with a pin, may be attended by technically a neurosis, but where a disease follows it is different proposition entirely. Nervouseness

from a fight on the street where you get a black eye is not neurosis in a medical sense. It is the result of excitement, injury, pain, temper, etc. I mean to say that where there is injury to the bony structure, the small of the back in the region of the lumbar vertebæ, there isn't apt to be traumatic neurosis, but there may be. With certain types of individuals of a nervous temperament, an underlying base, any kind of an injury may be followed by profound neurosis. You do not have traumatic neurosis in the ordinary case, it is the exceptional case that you get it. Injury to the spinal column has no more to do with a case of nervousness than a mash on the finger, so far as the injury itself is concerned—or the tooth ache. You may, of course, have injury to the nerves as the
150 result of spinal injury. It is not true that whatever the injury may be to the spinal column you would expect to find injury to the nervous system. It depends entirely upon the character of the injury. A fracture of the skull of a human being is a most unimportant fracture if you do not injure the brain. It is important only to the extent that it injures the contents of the cavity. A fracture of the spinal column, which is a canal down through which the spinal cord goes, may be without any damage to the cord at all, and if it don't, it will have no effect on the central nervous system. In this case under consideration the spinal cord stops five or six inches above where you are claiming this was fractured. The cord don't come down through these vertebræ; the cord stops just below the ribs. There are large nerve trunks that lead in definite directions to different parts of the body, the injury to which is just as clearly manifest as touching a key on a piano,—you know which nerve you will hit because the fellow knows it—one to the rectum, another to the bladder, and another to the leg, and you can tell exactly which nerve has been impinged by this injury. It is not a deep mysterious proposition; you can pick out the injury exactly. There are very definite symptoms. If there is an injury to the sacrum by fracture, whether it could be cured without an operation depends upon the extent of the injury. A relaxation you never get from an injury. Dislocation you may get from an injury and the results depend upon the nature and character of it. When I spoke about a man not walking within months or a year I was speaking of a fracture at the sacro-iliac joint. The only way you can get dislocation is by a fracture. Looking at this picture there is only one transverse process, one and the other partially shown. The fifth one shows clearly and a half of the fourth from the upper end down. There are five in that section of the column. There are thirty-two in the whole spinal column in most men; a good many have thirty-three. There are some of those pictures in which the object was not on a line or level, but not sufficient to disturb the anatomical land marks. I don't think there is anything in the picture to indicate a change of the position for the purpose of procuring a defect. If there was a fracture, after they healed he would be well so far as the transverse processes were concerned or as far as pain was concerned. He would be well as far as those fractures were concerned. I am not able to say what

else he might suffer with. He might have measles or tuberculosis or almost anything. I am not trifling in this matter. I mean to say that in so far as these bones are concerned, after they had
151 healed a man would be just as well as he was before the accident. I mean to say that he might have many other things not connected with this accident, and after they healed there would be no effect from those bones being broken. I am talking about the effect of a fracture of the bones, upon his anatomy, his nervous system or whatever might be affected by it. I can tell you what the clinical picture would be of a man who had those bones broken off. I said this man was well as far as those bones were concerned. The evidence of injury to those bones amounts to nothing. Injury to the soft parts, torn and lacerated, might be very serious. He might have laceration of the muscles; might have a kidney knocked out of place. If those processes were broken by outside violence, with a kidney knocked out of place the man would die in thirty minutes. So far as the evidence of those plates is concerned, if there was any fracture, it would be evidenced in the same way as any other fracture line, as shown by any bone. It would be a very dark shadow showing. If there was no separation and no displacement and deformity, it would be a straight line, a dark line. Any fracture line is a dark line. The width of the line would depend on the width of the separation. If it were cracked and not separated it would be a dark line.

The Court: Might there not be an injury to those bones without a fracture?

A. No, they can't be displaced without a fracture. Any bone may be bruised and the covering of the bone injured without fracturing it. That wouldn't show in the picture at all. My principal business in the practice of medicine and surgery in Chicago is largely consultation as a specialist. I think for the last two or three years it has been nervous and mental conditions. I have been Insanity Commissioner for Cook County for six years. I have come in contact with a great many county cases and also individual cases. For seven years I had full charge of all the injuries of the Chicago Street Car Company. We ran about fifty to sixty accidents, taking all types and characters. My work is largely executive. We had quite an organization. I frequently examined them myself and helped take care of them by direction. I have testified in many cases. I mean to say I testify for railroad companies generally. I am called in many cases where there is a medical or surgical matter involved in a lawsuit. I am called in the capacity of an expert, giving an opinion as to the extent of the injuries and the general character of the case.

The Court: About the same capacity you are here?

152 A. Practically the same, except the majority of cases I am called into I have either examined or am ordered to by the Court. I am employed only specially by railroads. I don't represent any of them. I have been called in surgical cases by a

great many of the trunk lines, the New York Central, the Wabash, Milwaukee & St. Paul, Chicago & Alton, Great Western, Western Indiana, Illinois Central. I am not a surgeon for them nor have I any general employment with any railroad. I am not retained by any of them. They call me into a case, and when I attend either in court or not, I charge them for my time. I have been called in a great many cases not to testify,—called by lawyers, and they didn't allow me to testify after they got my opinion. Got here Monday morning. I was here Saturday. Came back Monday morning. I have not been in consultation with the doctors for the railroad company and the attorneys all this time.

Redirect examination:

By shock I refer entirely to a condition. There are certain cardinal symptoms in shock. It varies in degrees from slight disturbance up to profound and continued unconsciousness. It shades all the way from a local transient condition like the stick of a pin up to the point where you are profoundly knocked out and unconscious. In transient shock there are no symptoms manifest to speak of. In more grave situations there are certain distinct symptoms that are well established. The patient becomes pale, the pulse becomes very rapid and small and fine and entirely depressible. You can press down on the pulse and destroy it entirely, beating extremely rapid, the pupils of the eye dilate, there is a cold clammy sweat on the brow. The patient is either unconscious or semi-conscious. By the temperature, pulse, and respiration you can tell whether one is or is not suffering from shock.

Recross-examination:

There are many other conditions in which the pulse, temperature and respiration are indicative of conditions other than shock; different kind of pulse and temperature and respiration; in both cases abnormal.

The Court here limited the defendant to two witnesses regarding the diagraph.

153 Sister MARY IDA, called for the defendant testified:

Have lived at St. Francis Hospital, Waterloo. Have been employed as a nurse there for the last two years. Remember the time Mr. Dahn was brought there from the wreck. I helped nurse him. Had charge of him in the day time. Sister Mary Delaphina had charge of him at night. She is here in the court room. The paper marked Exhibit "4." composing four sheets, I have seen before. We nurses have full charge of the patient. We keep a written statement from time to time of our doings from hour to hour. That is one of our records. That is the hospital record in the case of A. J. Dahn. At the head it says "St. Francis Hospital." Next is the patient's name, "A. J. Dahn;" "Dr. Porterfield" below. The first column is marked "date," the second column "Time;" the next is temperature,

the next is "pulse" and the next is "respiration" and the next is "nourishment." The next column, marked "Frequent" and "Remarks" covers any general remarks. Entries as to ounces of urine and defecation would be at the time there given. They are on the chart. Under the head of time, where it is "A" it means "A. M." and "M" means "P. M." I made the entries on this file Exhibit "4" that are marked opposite the hours in the day time from 8.00 to 8.00, at or about the time indicated on the paper. Made them correctly at the time. They show the correct entries and they are now as I made them. On the date 5-29-1918, under "Time, 10.15," "Treatment, Cleansing Bath," I made that entry, and I personally know that a cleansing bath was given, for I gave it to him. He was washed and cleansed. I gave him the bath before he was taken to the operating room. His face was washed. I gave him a bath, as I said, before he went to the operating room. Before I was entirely finished, he was taken to the room, at 9.30. He returned at 10.30. At 10.30 he was given water and his wounds and burns were dressed by Dr. Nestor.

(At the request of counsel for the plaintiff the plaintiff was permitted to cross-examine about Exhibit "4.")

Cross-examination for the plaintiff:

The black hand writing was made by me, all of it. Time, 8.00 o'clock in the morning till 8.00 o'clock in the evening. I think for four days there was another nurse in charge of this patient, Miss Valentine, not one of the sisterhood. She was in charge also the same time I was for four days, the 3rd, 4th, 5th and 6th of June. I didn't make any entries during the time she had charge of him.
154 There is another sister there when one of us is off. We give a report of the patient and date the chart. Each one is required to keep a record herself. This record was made by me, Miss Valentine, and Sister Delaphina, who took care of him at night.

Redirect examination:

When I say he was given water or milk, I mean he was given that. In the record "Soft Diet" means soft foods easily digested. The words "general afternoon care" "P. M." mean getting the patient ready for the night. "Morphine quarter quarter" means morphine one-fourth grain. On the 30th, "light diet" means three times a day, what I have marked after it. Temperature, where it is marked 100 period 2, means 100 1/5 on the 29th at 11.00 a. m. '84 pulse" on that day means pulse beat. "Resp. 20" means 20 respiration. Notice of the time of day that the doctors called means when they came. On the 31st, under the head of "Treatment, sponge bath" means a cleansing bath and sponge bath all over. When it says "Up in chair an hour" it means the patient. The name of medicine mean the medicine given him. Where it says "Had good night" that means he had a good night and slept well. Where it says "Had a good day" that means he had a good day. The entry

there, "7.30, had a fair day" means he had a fair day, just as well as he could be expected to have under his conditions. That is true wherever I made the entry. Ordinarily, a bath consisted of a general cleansing of the body; he was bathed with water, washed with soap and water and a rag, all of him.

Cross-examination:

I gave him the bath in bed in his room. They took him to the operating room before I finished. When he came there his face had blood on it. His hair was matted around the area of the injury on the head. It was matted around the wound. It was not bleeding when he entered the hospital. It was bandaged. Afterwards it was sewed. I don't remember the extent of the injury. I didn't give him any morphine that I remember. He received it for his pain.

The Court: I presume he was given morphine, although I don't know anything about it. It may be presumed he had it while he was there if he needed it.

Defendant's Counsel: I am willing to offer it now (the record) if you will waive further identification and proof of the rest just as she gave it. I don't care to take up time with these other wit-
155 nesses if they will admit that they will testify as she has and that the records are records of that hospital, kept daily and kept on file at all times.

Plaintiff's Counsel: All right, sir. Go ahead.

Defendant's Counsel: We offer the whole record in evidence with that explanation and that agreement of counsel.

The Court: I am not going to permit Counsel to control the introduction of testimony here. I am not going to have the records in this case encumbered with the records of this hospital. I want both of you to understand that.

Defendant's Counsel: You mean these records?

The Court: These records of treatment before us there or of this patient.

The Court: If there is anything that disputes the testimony of Mrs. Dahn on the trial of this case that you have got there, anything that disputes it, produce it. It may go in evidence.

Defendant's Counsel: Then I offer in evidence under the head of "Remarks" the statements as to the matters of the condition of the patient as represented by "Restless part of the night" "Had a fair day" "Had a good day" "Had a good night" as they appear in those records; under the head "Hours from 8.15 to 9.30, May 29th, 1918, cleansing bath; had wound sutured. No anæsthetic. Returned to bed." Under 10.30 there, "Wounds and burns dressed by Dr. Nestor." On that morning, "Wounds and burns dressed by Dr. Nestor." There is no dispute between counsel. He says this was done before she got there and testified as to his condition.

The Court: Go ahead.

At 9.30, "Complained of pain." On the 30th, "Had a fair day. Restless part of the night." On the 31st, "Up in chair. Dressing

changed by Dr. Nestor. On the 3rd of June, "Had a good day. Slept fairly well. On June 1st, at 4.30, "Had a good day." Next morning, "Had a good night." On the 2nd of June, evening, "Had a good day;" six o'clock in the morning, "Had a good night. On the 10th, "Dressing changed by Dr. Sigworth." At 5.00 o'clock on the morning of the 3rd, "Had a good night." 5.00 o'clock in the afternoon, of the 4th, "Complained of pain." Seen by Dr. Sigworth. Complained of pain in the head or back." On the 5th, at
5.00 o'clock in the morning, "Had a good night." On the
156 6th at 4.30, "Had a good night." At 10.00 o'clock June 6th,
"Sutures removed by Dr. Sigworth." Adhesive straps applied to back." 7.30 in the morning, "Had a good night." On the 8th, "Had a good night." No, at 8.00 o'clock in the evening, "Had a good day. Next morning at 7.30, had a good day. Doctor called. Sponge bath and alcohol rub." Next day, "Alcohol rub. Had a good day." And following on the 9th in the morning, "Had a good night." At 7.30, "Alcohol rub. Dressing changed by Dr. Sigworth. At 7.30 p. m. "Had a good day." On the 10th of June in the morning, "slept well." The same day at 10.00 o'clock, "Tub bath and alcohol rub." 7.30 in the evening, "Had a good day." At 5.00 o'clock in the morning of the 11th, "Slept well." On the 11th at 7.00 o'clock, "Out of doors this afternoon." At 7.00 o'clock, "Had a good day." On the 12th, at 5.00 o'clock a. m. "slept well." At 7.30, "Up and about. Out doors at lib." At 7.30, "Had a good day." On the 13th, "Dressing changed by Dr. Porterfield." "Out doors." "Admitted May 29th, 1918; discharged June 13th, 1918.

Recross-examination:

We intended to report everything as nearly as possible. I put in all the complaints made to me. The removing of dirt or blood from the head or body would be put in "bath." We didn't put in all the history of what happened to him before he was brought into the hospital. We knew he had been burned. We have stated there that the burns were dressed and the head wounds sutured. I knew of no other injury on his head. I don't remember an X-ray picture being made at that time. It might have been at a time I wasn't there. I was away four days, during the entire time he was there. I know of no picture being taken. I would have put it down had I known of it.

A. C. TENNEY, called by the defendant, testified:

I live at 112 South Michigan Boulevard, Chicago. Am forty-six years old. Am a physician and surgeon. I [garduated] at Hahnemann Medical College, Chicago, in 1895. Spent one year as a hospital interne. I engaged in the practice of medicine in Iowa from 1896 to 1903, first at Mount Vernon, then at Clinton; came to Chicago and took a post graduate course in Chicago in the Chicago Clinical School and Chicago School of Electro Therapeutics. After coming to Chicago I took post graduate work in the University of

Chicago, the graduate department of the Rush Medical Col-
157 lege, the New York post graduate in New York City, the graduate department of Harvard University in Boston, and special work in the study of blood diseases in the Huntington Memorial Hospital in Boston. Have been engaged in teaching medicine since 1905, teaching bacteriology, pathology and internal medicine. At the present time I am professor of physical diagnosis in the Illinois Post Graduate Medical School in Chicago. I had one of the first X-ray machines that was ever shipped west of the Mississippi River, sent out here to Cedar Rapids to show the Iowa doctors what the X-ray was, a Burturn machine. I have in connection with cases that are referred to me in my own private practice an X-ray outfit costing $4,000, the latest outfit. I have used the X-ray ever since it was made practically; in 1897 I think it was the first machine I bought. I have examined thousands of plates, have made repeated exposures, use it daily. Am familiar with the method of taking pictures. An X-ray negative, such as we have here to-day, is a shadowgraph. It is a shadow of the bones and other tissues as cast upon the plate. We generally use a table in taking these pictures or negatives. The patient is laid upon the table, the tube in which is generated the X-ray energy is suspended above him by whatever means the particular outfit we use provides, and the rays are driven through the body and a shadow effect is produced upon the plate. Now in order to do that we have several devices for centering the ray, we have on our newer outfits a scale so that you can read off just by glancing at that the elevation of the [rube]; we have meters for measuring the amperage and voltage; we have a timer for measuring the time of exposure, the time of exposure makes a difference in the product you get. You can blur out the evidences of trouble, or you can make something that shouldn't be permitted to cast a shadow, some normal curve as in a woman, taking a picture of the breast when the bust is full and have a large bosom, may cast a shadow unless you have your ray so arranged to cut out the soft tissues. That is the penetration is to be gauged, the time of exposure is to be gauged. And then you have to have the patient in a mechanically correct position, the slightest tilting of the body one way or the other, or the slightest deflection of the target in the tube to one side, or up or down, might give you a distorted image. Not only must one have a natural, ordinary, work-a-day knowledge of anatomy, but they have got to have a knowledge of that anatomy in shadows. Then after you have made your plate the developing of
it is a matter so important that it is a common saying with
158 X-ray men that fifty per cent of your work is in the dark room. You have to have an active developer which works quickly, your temperature must be regulated, the temperature of the bath, then the fixing solution and the washing and the general care of the plates so that the emulsion on the face of the plate is not injured. All of these things have to be considered. It is a very technical, highly developed department, and it would be useless to burden you with the details except as they may come out in connection with some of these plates here. Let me take one of these plates for

the purpose of description. I will use the one marked Exhibit "M." If I hold that, you see it has a velvety appearance, and on this side a highly glazed appearance. This is simply a piece of ordinary clear glass upon which has been spread an emulsion containing—with a japanned base in which has been incorporated the salts, silver salts or berian salts or whatever salts are used by the different makers of plates, which produces a photographic plate of extreme sensitiveness; the most sensitive plates made are X-ray plates. There are several different manufactures, Eastman plates and the Victory plates; kodak manufacturers, kodak plates. Now each has their own particular formula. Some are better for one kind of work and some for another. You could take this plate and put it in an old fashioned camera and take a picture on it just the same as you do with a shutter and a little push bulb. But being prepared especially for X-ray work it is quite likely that it would have to be timed a little longer or a little shorter than the ordinary daylight exposure. Now these plates are encased first in a black envelope, and over that black envelope is an orange colored envelope, so that all the rays of the sun which might possibly get to the plate to injure it or to blur it are cut out, and we handle them in those envelopes just as naturally as we handle a pencil or watch. Now if in putting that plate under the patient, or holding it in front of them, we happen to put the glass side toward them we wouldn't get a very good image. If we did not expose it long enough our image probably wouldn't come out at all, so we always endeavor to have as little intervening between the patient and the plate as possible, and we take the plate with the emulsion side up and lay it flat on the table and place—I will illustrate this a little more in detail. Let's imagine that this paper here represents the black paper, the same quality and weight of black paper used in making the envelope, and then an orange colored envelope over that, then if I want to take a skiagram of my hand, simply lay my hand on the paper, center my tube up here, a distance of
159 twelve, fourteen, eighteen, twenty, twenty-two inches above the plate over the point that I want to get the image of. If I had an enlarged joint on this first finger and one on the little finger here I would want to get them both on the same plate to save time and expense, I would center the tube on the space here midway between the two. If I want to get it over just one particular joint I set it right over that joint. Everything around the region that I center my tube on is a little bit distorted. Right under the center for a small area varying from three to eight inches in diameter you get a very faithful reproduction, according to the tube distance, by which is meant the distance of the tube above the plate. As I said, we have the tube above the plate over here. We have it down low, then the area which gives us accurate detail is smaller. If we have it up higher than the lateral rays come off to the side are more direct and we get a larger area than is faithful outline without distortion.

Q. Doctor, did you examine—Doctor, in this shadow box before the jury I have what has been introduced here as Exhibit "M." You examined that this morning?

A. Yes, sir.

Q. I wish you to look at it and to tell me whether there is any indication of there being or having been a fracture or separation or relaxation of the [sacro-ilia*l*] joint?

A. This is the same one I examined before. I don't need to take up your time to examine it again. There isn't any evidence of relaxation or abnormal changes in the sacro-iliac joint.

Q. In either one of them?

A. On either side.

Q. Now in that picture is there any evidence appearing to you, and asking you as an expert, of any injury, breakage or injured part of the transverse processes of either of the five lumbar vertebræ?

A. No.

Q. State whether or not there is an entire absence of such indications in the picture?

A. There is an entire absence of any indication of fractures or other abnormalties on the spine or the pelvis as shown here.

Q. When you use the word "abnormalities" you mean unusual?

A. I mean that that is the same kind of a negative you should get from any healthy man of that size and weight that hasn't had an injury or any active disease.

A. Well there is not, or is there any evidence of disease?

A. None at all.

Q. Now did you examine the other side of it?

160 A. I examined it both ways, yes sir, simply whether you look through the glass and whether it is right or left, it is all the same.

Q. Now would you call that a very distinct picture?

A. I would call that a rather satisfactory picture of a heavy subject. Let me call your attention to one thing here. See that spot there.

Q. Yes.

A. That spot there, indicating points lying over the middle portion of the sacrum, and the spots indicated here, dark spots, you see this spot here, several of them, one, two, three, four, five, six, indicating points lying on the left side of the plate, film side upward, reaching from the middle of the left iliac spine to about two and a half inches above the crest of the ilium, now those are all the results of gas in the intestines. Gas in the intestine has a peculiar effect of seeming to contort the rays and shooting them through obliterating the normal density of the bone. This bone here, and here, is of the same density, and it would seem there as though it was eaten out, and it is a mistake we used to fall into and used to operate on people where there was something [*usposssed*] to be eaten out, an ulcer or something of that kind, find nothing at all when we opened them up, simply a case of those gas shadows. Down here it looks as though something was wrong with the sacrum. The other plates [shows] there is nothing wrong. This is a gas shadow a gas defect in the plate, and you may find the same thing in different parts of these other plates due to the influence of the gas in the intestines on the X-ray as it travels through not making the shadow, the tube being

out in front and the plate behind. I can tell that this is at the left of the picture, and again, on about the middle of the ilium running up are not fractures because in the first place it looks just exactly the way the descending colon looks when you have it full of an opaque substance like bismuth and berian solution, two ounces of berian to one quart of buttermilk flavored up and you see just that same shape, the same as you recognize the shadow of a dog or a rabbit on your curtain, you recognize a shadow there. Then its location is typical. There is where it belongs, is the descending colon. Then the difference in the coloring that I have called attention to tells what it is. If that was the first plate I had ever seen I wouldn't know what that meant, I wouldn't know whether it was a fracture or a gunshot wound or tuberculosis of the bone, but I am able to state positively
161 that that is due to gas in the descending colon. Simply what you brought me out here for, a matter of experience.

Q. Now is there any defect, breakage or separation or relaxation apparent in that picture?

A. No, nothing.

Q. In examining these three pictures, Doctor, what is your statement to this jury after the examination of "M," "N" and "O" and each and all of them as to whether any breakage or cleavage or injury or separation or relaxation of any joint, or any injury whatever, is demonstrated by the picture?

A. Nothing in any of them.

Cross-examination:

If we had a separation of the ilio-sacro joint on the left side, we would have a little curve on this side, only not so marked. We would have an offset in it. Then on the other side we would have a similar condition here, and an offset, and then our curve continued. We would have an abnormal widening of this line here. I recognize this as a normal pelvis. That is all. If there was a fracture there, no matter how small it was, the bone would appear to be raised up, as I have marked it, to the extent of the fracture. You break a bone anywhere and you get a displacement that shows on both sides. I am talking about [*I am talking about*] a displacement of the ilio-sacro joint. If you have any displacement of that bone it extends to the entire joint. This represents a side view of the pelvis. This is a front view. This is the side of the sacrum, and that is the region where you have the ilium joined to the sides of the sacrum.

(Witness points out the points of juncture and joints.)

Between the bones are the cartilage and the connective tissues. Then in front and behind we have the strong ligaments. There is a thin layer of cartilage and fibrous tissue which later in life ossifies and turns to bone across the entire width and through its entire depth. It is not quite so dense as the bone. There may be diseased tissues in which it becomes more dense. At thirty-four years it would not be entirely ossified. It would be a little more bony than cartilaginous. A fracture where we have drawn the line would have

to be produced by something producing a transverse fracture or chopping off of the side of the sacrum. [*Fi*] you had a transverse fracture [*you*] there would be a line straight across, wavy, perhaps, in some places, but extending across more or less directly. The
sacrum is made up of several segments which ossify early in
162 life, and these fractures when they do occur at these points
between the centers of ossification, so we generally get a pretty straight line. It is a very rare condition. Now if a man happened to fall on a hand spike, pick-axe or something of that kind, and chipped off one point there, or got a bullet through his buttocks and chipped off one side you simply have a punched out area there and particles of bone scattered around it. That would appear like a punched out place. The crest of the ilium measures from 3/8 to 5/8 of an inch. At the point of juncture of the iliac bone and the pubic bone it measures about half an inch at the edge. Understand the edges are made wider in order to furnish muscular attachment and strength and then in between the edges it is very thin, about a quarter of an inch or 3/16 of an inch. A fracture there would look punched out with fragments of bone around it. A crack would be indicated by a line across there. It would be like this where the gas is only it would run in a line. It would have the outline of a fracture, not the outline of gas. I mean to say that this dark surface on the right picture as shown there indicates gas in a descending column; that is what [*is*] represents absolutely. I have followed the bismuth through and the berian through and seen these shadows of the substance so many times that I recognize what kind of intestine it is in seeing the shadow. In that case I introduced bismuth for the purpose of producing a colon. I see some of the viscera. That spot is due to a small intestine down there in the pelvis. Look at that bulged area. That is the ascending colon. How do I know? Well, if you had met me every day for forty years—it is like a cloud, a cloud of gas in the intestine. exactly. The ascending and descending colon are more frequently the seat of accumulations of gas than the transverse and small intestines. Probably in taking this picture the compressing diaphragm was used and the transverse colon was forced up out of the field of radiography. Whether the kidneys are more dense than the contents of the bowels depends upon the contents of the bowels. You know that varies everywhere from gas to hard impacted feces; I can find a hundred men of every variety right in this town. The kidneys belong right here under the short ribs. You might say this represents a portion of the alkaline of the inferior pole of the left kidney.

(Witness on being asked to point out the ribs in the picture points them out.)

163 You can see them. All you have to do is to have them
pointed out to you. The bladder is located away down here. I think in this picture the colon is almost as clear as the bony structures, when you know what those are, gas bubbles, but the bone comes out clearest of all because it is the densest.

(At this point a different picture is put in the box.)

This picture is approximately the same region of the body as shown in the one we have just taken out. It shows the ascending colon, the descending colon, the same or similar shadows over the region of the sacrum. It isn't so good a plate as the other one, and there are little shadows all through it. The penetration was low on this plate. The exposure may have been short. It looks as though the subject had moved. The subject had moved or else in developing it the fluid was allowed to run. It gives you a streaked appearance across the film. It may have been this was taken face down, but I don't think so. The spine appears magnified when it is taken face down you know. If this is the same person, it was taken in the same position as when the other plate was made. There is no evidence of fracture in any of the transverse processes of the lumbar vertebræ or elsewhere there in the three plates. I can find no evidence of fracture of the vertebræ or processes of the vertebræ. I cannot in this picture get a clear cut view of any of the transverse processes except the fifth lumbar, and that is best seen on the left side, the right side being somewhat obliterated by a gas shadow. There is no evidence there of value. You simply throw this kind of a plate into the junk heap and make another one. There is none of those processes of the vertebræ that appear broken off or fractured. The shadows there are gas in the intestines or heavy material in the intestines. You have got this gas here in the ascending colon. It obliterates that part at that point. The crest of the ilium, one of the densest areas you are making a radiogram of in this locality, appears darker, whereas it ought to appear whiter than the bone beneath it. That is the effect of this gas. If there are fractures in the bones, they are covered up. You can't see any there. You can't see the ribs in there. You can't see the ribs here. You can see some of them, one, two, three of them. I am practicing medicine and surgery in Chicago, in active practice, consulting work and private practice. I have a large [quite] of offices, a technician, X-ray operator, all the time. I want you to understand that I am not a court expert. I am not in the employ of any railway company. I am occasionally 164–191 called on by them. I give advice for any one who has the price. I don't always come for a price. I mean it is loss of time loss of money.

Redirect examination:

I am not connected with any railroad. The first time I was asked about this case was to come out last night. There is nothing in the picture just shown of any value positively or negatively showing a fracture, breakage, cleavage or separation. There is nothing showing a fracture or dislocation.

The Court: You see nothing there you say Doctor that looks like a fracture?

A. No; but even if I was looking for a fracture, your Honor, I wouldn't place any reliance on that plate?

The Court: I am going to ask you, do you see any in the other, either of the other plates that looks like a fracture?

A. No, the others are pretty fair plates, one of them is very good, but there is no evidence of any fracture.

The Court: Is there anything that looks like one?

A. No, nothing that looks like one.

Recross-examination:

I have used a great many of these machines. I have the most modern type now. I had one first in '97, '8. The principal machines to-day are the Wapler, the Standard, the Victory, the Kelly. Those are the chief standard ones. There are one or two others. There is the Shidell-Western.

Redirect examination:

The Court: There has got to be a last question. I want to ask you another question, Doctor; if a witness was examining one of the plates that you examined and testified that he saw a fracture there would you think he was mistaken?

A. Yes.

192 *Instruction No.* 11.

Certain rules have been offered and introduced in evidence found in the possession of the section foreman, Van Meter, concerning which you are told the violation of a rule made by an employer by an employee, the application of which rule calls for the judgment in following it out of the employee, is not in itself necessarily negligence. Negligence in this case is not to be determined by the rules of the defendant, but must be determined by consideration of all the facts proved upon the case. Employers may not make or determine what rules shall be or shall not be negligence, but
193–202 your determination of this question of negligence in any matter must be upon all the evidence introduced upon the subject.

F. H. HELSELL AND
NELSON & DUFFY,
*Attorneys for Defendant.*

Said instructions were refused by the Court and to the refusal to give each instruction the defendant at the time duly excepted and exception was allowed.

* * * * * * *

203 Thereupon, upon the 10th day of May, 1919, the jury returned a verdict in favor of the plaintiff in the sum of $7,500.00.

Thereupon, by order of Court, either party was granted thirty days in which to file any motion desired.

(*Motion in Arrest of Judgment and for a New Trial.*)

Thereafter, upon the 29th day of May, 1919, the defendant filed his motion in arrest of judgment and for a new trial in words and figures as follows:

Comes now Walker D. Hines, Director General of Railroads in and for and on behalf of the United States, and moves this Court in arrest of judgment in the above-entitled cause and for a new trial, for the following reasons:

1st. No cause of action was pleaded against this defendant and no right of recovery was set out in any petition as against this defendant because the petition affirmatively shows upon its face that the suit was brought, so far as the Director General was concerned "as representing said Illinois Central Railroad Company," and there was neither a sufficient allegation of such representative capacity to bind nor was there any evidence whatever to support the allegation that the Director General was acting as representing the said Illinois Central Railroad Company, and as said petition presented him in such capacity and sought to recover against him as representing said Company, no verdict should be allowed to stand in this cause.

2nd. The Court erred in overruling the motion of the Director General of Railroads of the United States for all and for each of the reasons urged in said motion jointly and severally, said motion having been filed asking the dismissal or abatement of the cause of action, each of the reasons given in said motion being by reference urged in support of this assignment of error.

204 3rd. The Court erred in overruling the demurrer of the Director General, defendant, to the petition of the plaintiff, for each and all of the reasons urged in said demurrer, jointly and severally, and said reasons so cited in said demurrer are urged specially, jointly, and separately as reasons for granting a new trial and in arrest of judgment.

4th. The Court erred in his ruling upon the demurrer of the Director General to the petition as shown by the memorandum and order of this Court filed in said cause.

5th. The Court erred in overruling instruction No. 1 asked by th defendant as the same under the record was necessary and warranted.

6th. The Court erred in refusing to give instruction No. 2 asked by the defendant, as there was in the record absolutely no evidence that the construction or maintenance of the bridge in itself was faulty or that the accident was due to any faulty construction or maintenance of the bridge, but the undisputed evidence showed that the accident was caused by a wash-out at the end of the bridge to the west, and no negligence was claimed in the petition because of the maintenance of the approach on either side of the bridge,

and it affirmatively appeared from the record and was undisputed that the accident happened not because of any defect or fault in making the bridge or maintaining the same.

7th. The Court erred in refusing to give instruction No. 3 asked by the defendant as the same presented a correct rule of law and was not given by the Court and was applicable to the case.

8th. The Court erred in refusing to give instruction No. 4 asked by the defendant, as the same was warranted under the evidence, presented a correct rule of law, and was not given by the Court.

9th. The Court erred in refusing to give instruction No. 8, as it presented a correct rule of law applicable to the case, and was not given by the Court.

10th. The Court erred in refusing to give instruction No. 9 for the same reasons as last above.

11th. The Court erred in refusing to give instruction No. 10, because the same presented a correct rule of law directly suitable to the particular case, was warranted, and the same was not given by the Court.

205 12th. The Court erred in refusing to give instruction No. 11 asked by the defendant for the reasons that a certain book of rules, in the possession of the section foreman, was permitted to be introduced by the plaintiff. No allegation of negligence or of a violation of any rule of the Company was pleaded or claimed as negligence by the plaintiff. No sufficient instruction was given by the Court having reference to the effect of the introduction of such rule. Instruction No. 11 was as follows:

"Certain rules have been offered and introduced in evidence, found in the possession of the section foreman Van Meter, concerning which you are told: The violation of a rule made by an employer for an employee, the application of which rule calls for the judgment, in following it out, of the employee, is not, in itself, necessarily negligence. Negligence in this case is not to be determined by the rules of the defendant, but must be determined by consideration of all the facts proven upon the case. Employers may not make or determine what rules shall or shall not be negligence, but your determination of this question of negligence in any matter must be upon all the evidence introduced upon the subject."

Under the instructions of the Court, the violation of the rule (not claimed to be negligence in the petition) was submitted as an allegation of negligence on which recovery could be had. The foregoing instruction offered a correct rule of law, if said rule was admissible at all, was applicable to the case, and was not given by the Court.

13th. The Court erred in sustaining the demurrer to Division 3 of this defendant's answer, as the defendant urged in said answer that this suit was brought, in reality, against the Government of the

United States, and by no law was the suit against the United States permissible, as the Acts of Congress did not so provide, nor did any legal order of the President or Director General so provide, and said Division 3 stated a complete defence, or a defence in abatement, against the petition.

14th. The Court erred in sustaining the demurrer to Division 4 of this defendant's answer, because in said answer was set up the fact that by the Act of Congress, Chapt. 458, 39 Statutes at Large, p. 472, approved by Congress September 7th, 1916, there was provided compensation for the employees of the United States suffering injuries or death while in the performance of their duties, said act also determining the method of procedure in obtaining such
206 compensation from the United States and providing for the assignment of any compensation received from others legally responsible therefor, if any should be received for the negligent act causing the injury; that this cause is pending to recover compensation from the United States through the Director General, its agent, and that no Federal law existed except as provided by the Act of September 7th, 1916, for the recovery of compensation from the United States; and said Division 4 presented both a complete defence to the matter and in entire abatement of the action. The aforesaid Act of September 7th, 1916, provided the only method of procuring judgment or pay from the United States while the plaintiff was employed as a mail clerk by the United States. This action pending against the United States, as it was, permitted no other way of recovering, and provided only for other compensation when some other person than the United States was legally liable therefor, and this action being brought against the Director General, acting for the United States, was not within the rule of Section 10 of the Act of Congress of March 21st, 1918, but was within the exception as being contrary to the Act of Federal Control, as above dated, and the provision of Section 26 of the Compensation Act of the date of September 7th, 1916, and this action would not lie, and said answer presented a complete defence, as aforesaid, and matter in abatement.

15th. The Court erred in sustaining the demurrer of the plaintiff to Division 5 of the defendant's answer for each and all of the reasons last above urged, and for the further reason that under the aforesaid Compensation Act of the United States it was alleged in Division 5 that the plaintiff had made application in the manner provided by said Act for compensation, and that said application had been affirmatively acted upon, and the plaintiff had been allowed under said Act all that was provided by the provisions of said Act, and the plaintiff having elected prior to the beginning of this suit to proceed under said act of September 7th, 1916, Chapt. 458, 39 Statutes at Large, it must be held that he had elected as to his remedy and right of recovery, and by Section 7 of said Act, in this case, being a claim against the United States, it was provided that the plaintiff could not otherwise recover against the United States, and hence this action would not lie.

16th. The Court erred in sustaining the demurrer of the plaintiff

the 6th Division of the answer, for each and all of the reasons last above urged, and for the further reason that by said Act of
07 September 7th, 1916, it was provided that a person electing to take advantage of said Act could not recover from the United tates any money in any other way than under said Act, and if he id recover from any other person than the United States who might e legally liable for his injury, such recovery must be paid back, hen collected, to the United States, under the conditions of said ct; and it would be perfectly futile to recover a judgment against he United States for money that had to be paid back to the United tates; and said answer presented a complete answer in defence and a abatement.

17th. The Court erred in sustaining the demurrer to the 7th Division of the defendant's answer for each and all of the reasons urged ist above, and for the further reason that said answer presented a omplete defence and matter in complete abatement of the action, nd showed that not only had the plaintiff elected to proceed under he Act for general compensation, dated September 7th, 1916, as foresaid, but that said Act had been so followed out by the plaintiff; hat he had had his application approved, and had been paid, in dvance of the beginning of this suit, compensation to him to date, nd an allowance for future support under the terms of said Act. That under the record no one was responsible for said injury but the Government of the United States, acting through its agent. That y Section 7 of said Act it was provided that a party receiving benefits nder said Act could in no way recover otherwise compensation gainst the United States. That by Section 26 of said Act it was rovided that any recovery against any other person than the United States, legally liable, should be paid back to the Government; and his suit being brought against the Government, in reality, in the ame of its agent, the Director General, was brought against the only arty liable for any injury, if there was any at all. That further ecovery could not be had against the United States, no other person r persons than the United States was or were liable for said accident r injury, and no recovery could be had against any other person egally liable, and for the reasons stated, said 7th Division presented natters of complete defence and in entire abatement of the action rought.

18th. The Court erred in admitting the book of rules in the possession of the section foreman Van Meter, for the reasons urged gainst the admission of said rules: They are incompetent, irrelevant, o foundation had been laid, and immaterial. The plaintiff had pleaded no claim of negligence on the part of the defendant
208 because of any violation of any rule made by the defendant or the Railroad Company. There was no evidence whatever hat said rules were then in existence or control, even though the Railroad Company had been in possession and operation of the railroad, nor was there any evidence that the Railroad Administration ad adopted or furnished said rules, or had authorized the existence r enforcement of said rules, and because negligence must be proved

by a showing of the acts and facts and conditions surrounding the transaction, and not by any rules adopted by anybody, said rules being for the government of the employees when in force, and it is impossible for the Railroad Company or the Director General to publish, promulgate, or enforce rules which, in themselves, would be evidence of negligence because of their existence only, the Court erred in admitting said book of rules.

19th. The Court erred in the examination of Dr. Porterfield, a witness for the plaintiff, after the plaintiff had examined said Porterfield as to his attendance and care of the plaintiff when in the hospital, the Court, on his own motion, making an objection to the cross-examination of said witness as to what he found to be the condition and appearance of the plaintiff's body when he examined it, said objection being that it was not proper cross-examination, and sustaining his own objection, when no objection had been made by the plaintiff's attorneys. Reference is hereby made to the record, which may be quoted in the bill of exceptions upon such matter, as said record has not been submitted to counsel for the defendant and counsel has not been able to obtain the same in time for the filing of this motion, and counsel for the defendant asks that a verbatim statement of said Dr. Porterfield's evidence, and objections made, rulings made, and exceptions taken, be embodied within the bill of exceptions, if one is necessary.

20th. The Court erred in limiting the medical testimony for the defendant to two physicians, as shown by the record.

21st. The Court erred in refusing to direct the plaintiff to submit himself to examination personally at the time said examination was requested by the defendant as shown by the record. The plaintiff had testified prior to such request on the part of the defendant that the plaintiff submit himself to an examination in the presence of his own physicians and attorneys and an equal number of physicians to be appointed by the Court are agreed upon by the parties, as to his having received severe and hidden breakages of the pelvic bone
209–212 and of the sacro iliac joint. He had exhibited himself in the witness chair and testified where he had the opportunity to and did manifest lameness in the back and hips. He had given ocular evidence by his actions before the jury as to his condition physically. He had testified about his physical conditions, which were not known, and could not be known, except upon a physical examination by competent physicians, to the defendant, testifying as to admittedly internal and very severe injuries, and had done this when the defendant requested the Court to direct his examination, as aforesaid, when there was nothing indelicate, offensive, or unusual to be expected in said examination, and when fairness and justice demanded that the real truth be obtained by a physical examination, and in refusing the request of the defendant, made after such testimony and exhibition on the part of the plaintiff, the Court erred.

Wherefore the defendant respectfully asks the Court to arrest the judgment and grant a new trial.

* * * * * * *

213–244 (*Motion in Arrest of Judgment and Motion for New Trial Overruled.*)

And upon the 1st day of August, 1919, the motion for a new trial and in arrest of judgment, as amended, was overruled, to which ruling, and each part thereof, the defendant duly at the time excepted and exceptions were allowed, and on said 1st day of August, 1919, judgment in behalf of the plaintiff was entered of record on the verdict in favor of the plaintiff in the sum of $7,500, with costs and interest, with an order that no execution should issue thereon for the seizure or sale of any property of the Illinois Central Railroad Company in the custody of the Director General of Railroads without his permission or consent. To the entering of said judgment the defendant at the time took exceptions, which exceptions were allowed.

* * * * * * *

245 (*Order Allowing Writ of Error.*)

Now on this 26th day of September, 1919, comes the defendant in the above entitled cause and presents to the Court his petition praying for allowance of a writ of error intended to be urged by him, and the proper transcript of the record and papers and proceedings upon which judgment has been rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, and that such order or other proceedings
246 may be had as may be proper in the premises; and in consideration thereof, the Court being fully advised in the premises;

It is Ordered that the Writ of Error in the above entitled case issue as prayed for in the petition.

(*Writ of Error and Clerk's Return.*)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the District Court of the United States for the Eastern Division of the Northern District of Iowa, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the April, 1919 Term, thereof, between Arthur J. Dahn, Plaintiff, and Walker D. Hines, Director General of Railroads of the United States, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record

and proceedings aforesaid, with all things concerning the same, t the United States Circuit Court of Appeals for the Eighth Circuit together with this writ, so that you have the said record and pro ceedings aforesaid, at the City of St. Louis, Missouri, and filed i the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the 23rd day of November, 1919 to the end that the record and proceedings aforesaid being inspected
247 the United States Circuit Court of Appeals may cause furthe to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of th Supreme Court of the United States, this 26th day of September i the year of our Lord one thousand nine hundred nineteen. Issue at office in the City of Dubuque with the seal of the District Cour of the United States for the Eastern Division of the Northern Dis trict of Iowa, dated as aforesaid.

[Seal U. S. Dist. Court, No. Dist. of Iowa.]

LEE McNEELY,
*Clerk District Court United States, Eastern Division of the Northern District of Iowa.*

Allowed by
HENRY T. REED,
*Judge.*

*Return to Writ.*

UNITED STATES OF AMERICA,
*Eastern Division of the Northern District of Iowa, ss:*

In obedience to the command of the within writ, I herewith trans mit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings i the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the sea of said District Court, at office in the City of Dubuque, Iowa, thi 4th day of November, A. D. 1919.

[Seal U. S. Dist. Court, No. Dist. of Iowa.]

LEE McNEELY,
*Clerk of said Court.*

248-270 (*Citation and Acceptance of Service.*)

In the District Court of the United States in and for the Northern District of Iowa, Sitting at Dubuque, Iowa.

ARTHUR J. DAHN, Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS, Defendant.

The United States of America to Arthur J. Dahn:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, and 60 days after service of this citation, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Eastern Division of the Northern District of Iowa, wherein the Director General of Railroads of the United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Henry T. Reed, Judge of the District Court of the United States for the northern District of Iowa, this 24th day of September, in the year of our Lord One Thousand nine hundred nineteen.

[Seal U. S. Dist. Court, No. Dist. of Iowa.]

HENRY T. REED,
*United States District Judge for the Northern District of Iowa.*

Service accepted this 27th day of September, 1919.

HURD, LENEHAN, SMITH & O'CONNOR,
*Attorneys for Arthur J. Dahn, Defendant in Error.*

Endorsed: Filed in the District Court on September 27, 1919.

* * * * * * *

271 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Plaintiff in Error.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5514.

Walker D. Hines, Director General of Railroads of the United States, Plaintiff in Error,

vs.

Arthur J. Dahn.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

F. H. HELSELL, &
CHAS. A. HELSELL,
of Ft. Dodge, Iowa.
W. S. HORTON
of Chicago, Ill.
Attorneys for Plaintiff in Error.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 18, 1919.

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(Appearance of Counsel for Defendant in Error.)

The Clerk will enter my appearance as Counsel for the Defendant in Error.

272

LOUIS G. HURD,
D. J. LENEHAN,
W. A. SMITH,
609 Bank & Ins. Bldg.,
Dubuque, Iowa.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 8, 1920.

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(Order of Submission.)

May Term, 1920.

Monday, May 10, 1920.

This cause having been called for hearing in its regular order, argument was commenced by Mr. F. H. Helsell for plaintiff in error, continued by Mr. W. A. Smith for defendant in error and concluded by Mr. F. H. Helsell for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

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273 (Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5514.—May Term, A. D. 1920.

Walker D. Hines, Director General of Railroads of the United States, Plaintiff in Error,

vs.

Arthur J. Dahn, Defendant in Error.

In Error to the District Court of the United States for the Northern District of Iowa.

Mr. F. H. Helsell (Mr. C. A. Helsell, Mr. W. S. Horton, and Messrs. Nelson and Duffy were with him on the brief), for plaintiff in error.

Mr. W. A. Smith (Mr. D. J. Lenehan and Mr. L. G. Hurd were with him on the brief), for defendant in error.

Before Sanborn and Carland, Circuit Judges, and Trieber, District Judge.

Carland, Circuit Judge, delivered the opinion of the Court.

Defendant in error, hereafter plaintiff, brought this action against Illinois Central Railroad Co. and the Director General of Railroads, hereafter defendant, to recover damages for personal injuries alleged to have been caused by the negligent operation of said Railroad. Plaintiff recovered a verdict against the defendant, the action having been dismissed as to the Railroad Co. Defendant brings error. The first contention made by counsel for defendant is that the plaintiff cannot maintain this action for the reason that it is in legal effect, an action against the United States and the plaintiff as an employee of the United States had prior to the commencement of the action applied for and received the benefits of an Act to provide compensation for employees of the United
274 States suffering injuries while in the performance of their duties. 39 Stat. 742. The facts material to this contention as they appear in the record are as follows: On May 29, 1918, plaintiff was a railroad mail clerk engaged in the performance of his duties as such while riding in a mail car composing a part of train No. 11, of the Illinois Central Railroad Co., then running over the track of said Company,

under the management and control of defendant. On said date and while he was so engaged said train was derailed and wrecked by plunging through a bridge composing a part of the roadbed of said Illinois Central Railroad Co., near Aplington, Iowa, and by reason thereof he was seriously and permanently injured. Division V of defendant's answer contains the following allegation:

"That under the act for compensation for the employees of the United States aforesaid, this plaintiff has made application in the manner provided by said act for compensation under said act and this defendant is informed and believes and charges that such application has been affirmatively acted upon and said employee has the benefit of all the provisions of said compensation act."

This allegation of the answer was admitted by par. 3 of plaintiff's demurrer to said answer, the demurrer being sustained. In subdivision 2 of said par. 3 in addition to the formal demurrer plaintiff also stated, "That even if it be true that plaintiff has been paid compensation under the Act to provide compensation for employees of the United States, such fact does not constitute any defense to this action, said act not purporting to furnish an exclusive remedy to plaintiff but on the contrary, expressly providing for the maintenance of an action of this character." On the record as it stands, and in view of the fact that at the trial the case was treated by court and counsel as if the plaintiff had applied for and accepted the benefits of the Compensation Act above referred to, the case must be treated here in the same way. The first question therefore to be considered is, was plaintiff's action in legal effect one against the United States? By Chap. 418, 1 Sess. 64 Cong. Approved Aug. 29, 1916, 39 Stat. 645, it is provided:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof,
and to utilize the same, to the exclusion as far as may
275 be necessary of all other traffic thereon, for the transfer
or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Pursuant to the authority thus given, the President on December 26, 1917 (40 Stat. 1733), issued a proclamation containing the following language:

"Now, Therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary of War, take possession and assume control at 12 o'clock noon on the twenty-eighth day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail and water systems of transportation;—to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

It is hereby directed that the possession, control, operation and utilization of such transportation systems hereby by me undertaken shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads."

"Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common
276 carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine."

On March 21, 1918, Congress passed an Act generally known as the Federal Control Act, being Chap. 25, 2 Sess. 65th Cong. 40 Stat. 451. Among other provisions of said Act are the following: "That the President, having in time of war taken over the possession, use, control and operation, * * * of certain railroads and systems of transportation

(called herein carriers)." "That any railway operating income accruing during the period of Federal control in excess of such just compensation shall remain the property of the United States." Sec. 6. "That the sum of $500,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, which, together with any funds available from any operating income of said carriers, may be used by the President as a revolving fund for the purpose of paying the expenses of the Federal control." Sec. 10. "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State of Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any Act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control." Sec. 12. "That moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be property of the United States. Unless otherwise directed by the President, such moneys shall not be covered into the Treasury, but
277 such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before Federal control." The Act of February 28, 1920, Sec. 206g, 262 Fed. 340, reads as follows:

"No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control." The first provision quoted above from the Federal Control Act recites that the President having in time of war

taken over the possession, use, contral and operation, * * * * of certain railroads and systems of transportation, called herein carriers, and thus makes it plain in our opinion that Congress correctly interpreted the original authority given the President and also his proclamation to the effect that it was the physical railroads and systems that the President took possession of and the Federal Control Act declares that these physical railroads and systems shall be called in said Act, "carriers." The original authority of the President authorized him to take possession and assume control of any system or systems of transportation. In his proclamation the President declared that he did take possession of each and every system of transportation and the appurtenances thereof. In view of the language conferring the original authority of the President and the language of the proclamation the word, "railroads" in the Federal Control Act must be construed to mean the same thing as systems of transportation. We do not think there can be any doubt about the meaning of the word railroads and systems of transportation as used in the several Acts of Congress and the proclamation of the President. In our judgment they refer only to the physical properties which constituted the system or systems. The system is composed of the roadbed, tracks, engines, cars and other appurtenances which are used in the transportation of passengers and freight from one place to another. The system is entirely distinct from the corporate entity which may own or manage the system. The President had no authority nor did he pretend by the language of his proclamation to take over the railroad corporation or corporations, which owned the several systems. The whole Federal Control Act is opposed to any such interpretation, because it provides for the payment to the different corporations of a com-
278 pensation for the use of the several systems and elaborate provisions are made for the protection of the rights of both parties. The United States owned no rairoad stock and did not seek to obtain control of the railroad corporations. The fundamental idea underlying the decision of the United States to take control of the systems was that it was necessary so to do in order that the great task of transporting troops, munitions and supplies might be carried on by the different systems to the exclusion of all other traffic if necessary. Any further control than to accomplish this object was not needed, sought, or obtained. The excerpt above quoted from the proclamation of the President to the effect that no attachment by mesne process or execution should be levied on or against the property used by any of said transportation systems in the conduct of their business as common carriers, but that suits

might be brought by and against such carriers and judgment rendered as hitherto until and except so far as said Director General might by general or special orders otherwise determine, clearly uses the words "carriers" as meaning the same as transportation systems because it was only such systems whose property could not be levied on without the written assent of the Director General. Whoever has the management, control and operation of a transportation system which is engaged as a common carrier in the transportation of passengers and freight from one place to another is the carrier, so far as liability is concerned for negligent operation. When we come to Sec. 10, of the Federal Control Act, we think that there ought not to be the confusion and want of harmony in the decisions in regard to its meaning, which seems to exist as to the question now being considered. The Federal Control Act starts out by plainly declaring that the railroads and systems of transportation which the President had taken possession of should in said act be called "carriers." According to Sec. 10, the "carriers", that is, the physical railroad systems shall be subject to all laws and liabilities as common carriers whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of the Act, or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgment rendered as now provided by law and in such suits no defense shall be made upon
the ground that the carrier transportation system is an
279 instrumentality or agency of the Federal government.

To decide that the words carrier and carriers in Section 10, mean the corporate entity, in the present case the Illinois Central Railroad Co., is not only to go in opposition to the plain provision of law conferring authority upon the President and the plain words of his proclamation, but also to what Congress has decided to be the true meaning of the words. It seems plain to us that the President had authority and did through Newton D. Baker, Secretary of War, take possession and assume control of each and every system of transportation and the operation thereof. That the possession, control, operation and utilization of such transportation systems undertaken by the President was directed by him to be exercised by and through the Director General. It would be unconstitutional and contrary to the law of the land to hold that the railroad corporation, in this case the Illinois Central Railroad Co., as a corporate entity should be liable for an act done or omitted to be done in the operation of the transportation system by another party over which it had

no authority or control. Zeigler vs. S. & N. A. R. R. Co., 58 Ala. 594; Mobile Light & R. R. Co. vs. Copeland & Sons, 15 Ala. App. 235; Bank of Columbia vs. Okley, 4 Wheat. 235; Hurtado vs. California, 110 U. S. 516; Dent vs. West Virginia, 129 U. S. 114; Leeper vs. Texas, 139 U. S. 462; Giozza vs. Tiernan, 148 U. S. 657; Jones vs. Brim, 165 U. S. 180; Maxwell vs. Dow, 176 U. S. 581; 6 Rul. Cas. Law. pp. 433, 446, embracing paragraphs 430 to 442 on Constitutional Law. Moreover Sec. 206g, supra, Act of February 28, 1920, specially provides that no execution shall issue against the property of the carrier (corporation), when the cause of action on account of which the judgment was obtained grew out of Federal control. We think the effect of Sec. 10, so far as the bringing of suits is concerned, was to waive the sovereignty of the United States so far as any suits that were authorized to be brought were concerned and to allow persons injured through negligence of the carrier which in the present and similar cases would be the Director General, to bring suits against the carrier the same as if the transportation systems were not under Federal control. If it was the corporate entity, in this case, the Illinois Central Railroad Co., which was to be liable for the negligence of the Director General, why did Congress provide in the Federal Control Act and the President in his proclamation that no execution should issue on the judgment? This is a provision not found in legislation in regard to litigation between private parties, but in litigation be-
280 tween private parties and the sovereignty, extending also to the cities and other corporations exercising governmental functions. We are of the opinion that the present action was one in effect against the United States and that they will be obliged to pay the judgment below if sustained. The Director General is sued the same as a receiver. He is not personally liable but the government is. General order No. 50, promulgated by the Director General, October 28, 1918, directing that actions at law, suits in equity and other proceedings thereafter brought in any court based on contract binding upon the Director General, claim for death or injury to person, or for loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of [tranportation] by the Director General which action, suit or proceeding but for Federal control might have been brought against the carrier company shall be brought against William G. McAdoo, Director General, and not otherwise, is an interpretation of the laws regulating Federal Control of Railroads by that Department of the government charged with the duty of executing the same, and such interpretation has always been re-

garded by the courts with great respect. U. S. vs. Cerecedo Hermanosy Co., 209 U. S. 338. There are well reasoned cases in the Federal Courts sustaining the views herein expressed. They are Rutherford vs. Union Pac., 254 Fed. 880; U. S. vs. Kambeitz, 256 Fed. 247; Mardis vs. Hines, 258 Fed. 945; Haubert vs. Baltimore & O. R. Co., 259 Fed. 361; Nash vs. Southern Pacific Co., 260 Fed. 280; Westbrook, et al. vs. Director General of Railroads, 263 Fed. 211; Hatcher & Snyder vs. A. T. & S. F. Ry. Co., 258 Fed. 952; Southern Cotton Oil Co. vs. Atlantic Coast Line Ry. Co., and Wade vs. Sea Board Air Line Co., 257 Fed. 138; Sagona vs. Pullman Co., 174 N. Y. S. 536; Oyler vs. C. C. C. & St. L. Ry., 17 Ohio L. R. 356; Public Service Commission vs. New England Telegraph & Telephone Co., 232 Mass. 465; Macleod vs. New England Telegraph & Telephone Co., 250 U. S. 195; N. P. Railroad Co. vs. State of North Dakota, 250 U. S. 135. There are other decisions construing Sec. 10 as providing for the bringing of actions against the carrier corporation just the same as if no Federal Control had taken place. The cases cited as deciding that it is the carrier corporation that must be sued are, Postal Tel. Co. vs. Call, 225 Fed. 850; Jensen vs. L. V. R. Co., 255 Fed. 795; Johnson vs. McAdoo, 257 Fed. 757; Witherspoon vs.
281 Postal, etc., Co., 257 Fed. 758; the Catawissa, 257 Fed. 863; Dampskibs vs. Hustis, 257 Fed. 862; Lavelle vs. N. P. R. Co., 172 N. W. 918; Gowan vs. McAdoo, 173 N. W. 440, 443; Palyo vs. N. P. R. Co., 175 N. W. 687; Ringquist vs. D. M. & N. R. Co., 176 N. W. 344; McGregor vs. G. N. R. Co., 172 N. W. 841; Franke vs. C. & N. W. R. Co., 173 N. W. 701; M. P. R. Co., vs. Ault, 216 S. W. 3; Lancaster vs. Keebler, 217 S. W. 1117; Clapp vs. Am. Ex. Co., 125 N. E. 162; Owens vs. Hines, 100 S. E. 617.

It would serve no useful purpose to review these cases. It is conceded that most of them declare the law contrary to the conclusion reached in this case but the reasoning upon which the decisions are based is not persuasive. The next question for consideration is, as to whether the plaintiff having applied for and received the benefits of the Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties is barred from maintaining this suit. Section 1, Chap. 458, 1 Sess, 64th. Cong. 39 Stat. 742, in part reads as follows: "That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty." Section 15, provides, "That every employee injured in the performance of his duty, or some one on his behalf,

shall, within forty-eight hours after the injury, give written notice thereof to the immediate superior of the employee. Such notice shall be given by delivering it personally or by depositing it properly stamped and addressed in the mail." Section 16, specifies what the notice above mentioned shall contain. Section 17, provides that unless the notice is given or unless the immediate superior has actual knowledge of the injury no compensation shall be allowed but for any reasonable cause shown the United States employee's Compensation Commission may allow compensation if the notice is filed within one year after the injury. Section 18, provides that no compensation shall be allowed to any person except as provided in Section 38, unless he or some one on his behalf shall within the time specified in Section 20, make a written claim therefor, and such claim shall be made by delivering it at the office of the Commission or to any Commissioner or to any person whom the Commission may designate, or by depositing it in the mail properly stamped and addressed to the Commission or to any person whom the Commission may by
282 regulation designate. Section 20 provides that all original claims for compensation for disability shall be made within sixty days after the injury, provided that the Commission may allow original claims for compensation for disability to be made at any time within one year. Section 26 provides that if an injury or death for which compensation is payable is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the Commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right he may have to share in any money or other property received in satisfaction of such liability of such other person or the Commission may require said beneficiary to prosecute said action in his own name. If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the commission he shall not be entitled to any compensation under the act. The Section last referred to then provides, as follows:

"The cause of action when assigned to the United States may be prosecuted or compromised by the commission, and if the commission realizes upon such cause of action, it shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expenses of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any,

shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury."

Section 27 reads as follows:

"That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

283 (A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury."

We have called attention to those provisions of the Act which relate to injuries caused by other persons than the United States, for the reason that the plaintiff claims in this case that the Director General was the agent of the Illinois Central Railroad Co., and therefore the injury received by the plaintiff was caused by a person other than the United States. It plainly appears from the Statute above quoted that whether the employee assigns his cause of action against a person other than the United States to the United States, and the same is prosecuted by said Commission or whether the employee prosecutes the cause of action himself, the employee gains nothing but the whole recovery after deduction of the expense of litigation either goes into the compensation fund out of which employees are paid or is retained by the employee and the amount thereof is credited to the United States on future payments. So that in any event the employee realizes nothing from the liability of a person other than the United States. In this very case the plaintiff would receive nothing if he

should collect his judgment other than his compensation under the Compensation Act. This discussion however is wholly futile as a mere inspection of the law conferring power upon the President to take possession of the systems of transportation and his proclamation in acting under said law makes it so clear that the Director General was an agent of the United States and not of the Railroad Co. that there is no basis for the contention of counsel for plaintiff. As we have before stated, the Director General was the agent of the United States and this action is in legal effect against the United States. The only question left is as to the right of the plaintiff to not only receive compensation under the Compensation Act but
284 also to sue the United States for the negligence causing his injuries. In other words must the United States pay both compensation and damages for negligence to the same person for the same injury? Workmen's Compensation Acts are all alike as to the object sought to be attained but they are so numerous and so varied as to details of administration that each act must be construed by itself. We are of the opinion that as to the United States, the Act in question is compulsory if the employee gives the notice and files the claim in proper form according to the terms of the Statute and the regulations of the Commission. It is optional with the employee as to whether he will make a claim under the Act or not. If he does not in our opinion he would have a right to maintain the present action and prosecute the same to judgment as we think that the United States as to this particular case by the Federal Control Act consented to be sued. But if the employee elects to receive the benefits of the Compensation Act and his claim is allowed, then he is barred from prosecuting his action for negligence against the United States. In other words he must elect which of the two remedies he desires to pursue and having elected to pursue one he may not pursue the other. The United States under the Statute being bound to pay the plaintiff after the latter has elected to claim the benefits of the Compensation Act, the remedy afforded by the Act is exclusive. Mitchell vs. Louisville, etc., R. Co., 194 Ill. Appellate 77; McRoberts vs. National Zinc Co., 93 Kan. 364, 144 Pac. 247; Shade vs. Ash Grove Lime, etc., Co., 92 Kan. 146, 139 Pac. 1193; Piatt vs. Swift, 188 Mo. Appellate 584, 176 S. W. 434 (Kansas Act); Middleton vs. Texas Power, etc., Co., (Tex.) 185 S. W. 556. That the employee cannot recover both damages and compensation is sustained by the following cases, Barry vs. Bay State St. Ry. Co., 222 Mass. 366, 110 N. E. 1031, 1032; Turnquist vs. Hannon, 219 Mass. 560, 107 N. E. 443; Cripp's Case, 216 Mass. 586,

104 N. E. 565, Ann. Cas. 1915B 828; Pawlak vs. Hayes, 162 Wis. 503, 156 N. W. 464; McGravey vs. Independent Oil, etc., Co., 156 Wis. 580, 146 N. W. 895; Woodcock vs. London, etc., R. Co. (1913) 3 K. B. 139, 6 Butterworth's Workmen's Compensation Cases 471; Page vs. Burtwell, (1908) 2 K. B. 758, 1 Butterworth's Workmen's Compensation Cases 267; Oliver vs. Nautilus Steam Shipping Co., (1903) 2 K. B. 639, 5 Minton-Senhouse's Workmen's Compensation Cases 65; Huckle vs. Council, 4 Butterworth's Workmen's Compensation Cases 113,
(aff 3 Butterworth's Workmen's Compensation Cases)
285 536, 26 T. L. R. 580; Mahomed vs. Maunsell, 1 Butterworth's Workmen's Compensation Cases 269; Murry vs. North British R. C., 41 Scottish Law Rep. 383; Mulligan vs. Dick, 41 Scottish Law Rep. 77; Tong vs. Great Northern R. Co., 4 Minton-Senhouse's Workmen's Compensation Cases 40, 86 L. T. Rep. N. S. 802; Workmen's Compensation Acts; Corpus Juris Treatise.

We are of the opinion that upon principle and authority the plaintiff is barred from maintaining this action for negligence against the United States which makes it unnecessary to consider assignments of error relating to the trial of the case. Judgment below is reversed and the case remanded with directions to dismiss the complaint of the plaintiff. Leave is given to substitute the name of John Barton Payne in place of Walker D. Hines, Director General, if defendant is so advised. (Act Feb. 28, 1920, Sec. 206.)

Filed August 2, 1920.

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286 (Judgment.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1920.

Monday, August 2, 1920.

Walker D. Hines, Director General of Railroads of the United States, Plaintiff in Error,
No. 5514. vs.
Arthur J. Dahn.

In Error to the District Court of the United States for the Northern District of Iowa.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Iowa, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that Walker D. Hines, Director General of Railroads of the United States, have and recover against Arthur J. Dahn the sum of Five Hundred Thirty-Four and 70/100 Dollars for his costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to dismiss the complaint of the plaintiff.

August 2, 1920.

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287 (Assignment of Errors of Defendant in Error.)

Arthur J. Dahn, former defendant in error, now Plaintiff in Error,

vs.

Walker D. Hines, Director General of Railroads of the United States, former plaintiff in error, now Defendant in Error.

And now comes Arthur J. Dahn, former defendant in error, now Plaintiff in Error, by his attorneys, L. G. Hurd, D. J. Lenehan, and W. A. Smith, and say that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Eighth Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to-wit:

1. Said Circuit Court of Appeals erred in entering judgment reversing the judgment of the District Court of the United States for the Northern District of Iowa, and in remanding the case with directions to dismiss the complaint of the plaintiff.

2. Said Circuit Court of Appeals erred in not affirming the judgment of the United States District Court aforesaid.

3. Said Circuit Court of Appeals erred in holding and deciding that this action is in legal effect a suit against the United States Government and not against the carrier corporation under Federal Control, that is, the Illinois Central Railroad Company.

4. Said Circuit Court of Appeals erred in holding and deciding that the term "carrier" or "carrier under Federal Control" as used in Section 10 of the Federal Control Act of March 21, 1918, does not mean or include the corporate entity,
288 that is, the carrier corporation, in this case, the Illinois Central Railroad Company.

5. Said Circuit Court of Appeals erred in holding that plaintiff, having applied for and received compensation under Chapter 458 of the 1st Session of the 64th Congress, 38 Statutes page 742, is barred from maintaining this suit.

6. The said Circuit Court of Appeals erred in holding and deciding that as to the United States the Employes Compensation Act aforesaid is exclusive of the right to sue the Carrier under Federal Control if the employee (in this case the plaintiff) elects to pursue the remedy under it and he cannot pursue any other remedy.

7. Said Circuit Court of Appeals erred in rendering judgment against this plaintiff in error (former defendant in error) for costs of suit in said Circuit Court of Appeals.

Wherefore, the said Arthur J. Dahn, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of said plaintiff in error the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the said Circuit Court of Appeals with instructions to affirm the judgment of the said United States District Court for the Northern District of Iowa, or that said judgment be affirmed by the Supreme Court, to the end that justice may be done in the premises.

L. G. HURD,
D. J. LENEHAN and
W. A. SMITH,
Attorneys for Plaintiff in Error.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 25, 1920.

289 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record and the additional transcript of record from the District Court of the United States for the Northern District of Iowa, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Walker D. Hines, Director General of Railroads of the United States was Plaintiff in Error, and Arthur J. Dahn, was Defendant in Error, No. 5514, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the foregoing transcript contains at pages 287 et seq. a full, true and complete copy of the assignment of errors received and filed on October 25, 1920, and included in this transcript at the request of counsel for defendant in error.

I also do further certify that on the thirteenth day of October, A. D. 1920, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the Northern District of Iowa.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-fifth day of October, A. D. 1920.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

290 In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 5514.

WALKER D. HINES, Director General of Railroads of the United States, Plaintiff in Error,

vs.

ARTHUR J. DAHN, Defendant in Error.

*Stipulation as to Record.*

It is hereby stipulated and agreed by and between counsel for the respective parties in the above entitled cause who have entered their appearance in the Supreme Court of the United States, that the certified transcript of record of said cause which has been heretofore filed in the Clerk's Office of the Supreme Court of the United States upon the petition for the writ of certiorari herein, may be taken as the return to the writ of certiorari which has been granted pursuant to said petition.

WALTER C. CLEPHANE,
J. WILMER LATIMER,
*Attorneys for Petitioner, Arthur J. Dahn.*
WM. L. FRIERSON,
*Solicitor General of the United States.*

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit, No. 5514, Walker D. Hines, Director General of Railroads, etc., Plaintiff in Error, v. Arthur J. Dahn. Stipulation as to Return to Writ of Certiorari. Filed Dec. 16, 1920. E. E. Koch, Clerk.

291 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Walker D. Hines, Director General of Railroads of The United States is plaintiff in error, and Arthur J. Dahn is defendant in error, No. 5514, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Northern District of Iowa, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals

and removed into the Supreme Court of the United States, do
292 hereby command you that you send without delay to the said Supreme Court as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eleventh day of December, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
*Clerk of the Supreme Court of the United States.*

293 [Endorsed:] File No. 27,962. Supreme Court of the United States, October Term, 1920. No. 605. Arthur J. Dahn vs. Walker D. Hines, Director General of Railroads of the United States. Writ of Certiorari. Filed Dec. 16, 1920. E. E. Koch, clerk.

*Return to Writ.*

UNITED STATES OF AMERICA,
*Eighth Circuit, ss:*

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Walker D. Hines, Director General of Railroads of the United States, Plaintiff in Error, vs. Arthur J. Dahn, No. 5514, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixteenth day of December, A. D. 1920.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.*

294 [Endorsed:] File No. 27,962. Supreme Court U. S., October Term, 1920. Term No. 605. Arthur J. Dahn, Petitioner, vs. Walker D. Hines, Director General, etc. Writ of certiorari and return. Filed Dec. 18, 1920.

5 In the Supreme Court of the United States, October Term, 1920.

No. 605.

ARTHUR J. DAHN, Petitioner,

vs.

ALKER D. HINES, Director General of Railroads of the United States, Respondent.

*atement of Points on which Petitioner Intends to Rely and of the Parts of the Record to be Printed.*

Comes now the petitioner, Arthur J. Dahn, and states that the ints on which he intends to rely at the argument of the above en- led case are those indicated in the Assignment of Errors filed by s counsel in the United States Circuit Court of Appeals for the ighth Circuit and incorporated in the printed record of this cause transmitted by him to this Court and contained on pages 284 d 285 of said record.

Petitioner further states that the parts of the record which he inks necessary for the consideration of said points are, to wit:

Pages 1 to 42, both inclusive.

The first four lines of page 43, ending with the word "accident."

On page 55 the words "George E. Meyers, called in behalf of the laintiff, testified:"

All on page 58 with the exception of the first line thereof.

96 The first four lines on page 59, ending with the words, "baggage car."

On page 68, all the balance of the page, commencing with the ords "Stipulation as to citizenship of defendants."

All of pages 69, 70, and 71 concluding with the words "Let the ecord show that."

On page 76 all following the words "got my head loose" on the fth line from the bottom.

On page 77, the first sentence thereof.

Page 118, Stipulation as to the expectancy of life by the Ameri- an Life Tables, ending with the words: "The Court: I will observe our objections and rule on it after while some time."

Page 203, entry of the verdict.

Page 213, the entry of the motion in arrest of judgment and notion for new trial being overruled.

Page 245, all commencing with the words "Order allowing writ f error."

Pages 246, 247 and 248.

Pages 271 to 286, both inclusive.

Proceedings effecting substitution of John Barton Payne in the place of Walker D. Hines, Director General of Railroads.

WALTER C. CLEPHANE,
J. WILMER LATIMER,
*Attorneys for Petitioner.*

Service of a copy of the above accepted this 17 day of January, 1921.

WM. L. FRIERSON,
By R. P. FRIERSON.

297 [Endorsed:] 605—27,962. No. 605. Arthur J. Dahn, plaintiff, vs. Walker D. Hines, Director General of Railroads of the United States, respondent. Statement of points on which petitioner intends to rely & of the parts of the record to be printed. Clephane & Latimer, attorneys & counsellors at law, Wilkins building, 1512 H St., Washington, D. C.

298 [Endorsed:] File No. 27,962. Supreme Court U. S., October Term, 1920. Term No. 605. Arthur J. Dahn, petitioner, vs. Walker D. Hines, Director General, etc. Statement of points to be relied upon and designation by petitioner of parts of record to be printed. Filed Jan. 17, 1921.

299 In the Supreme Court of the United States, October Term, 1920.

No. 605.

ARTHUR J. DAHN

vs.

DIRECTOR GENERAL OF RAILROADS.

*Additional Parts of Record to be Printed.*

Comes now the respondent, John Barton Payne, Director General of Railroads, and in addition to those parts of the record heretofore designated to be printed by the petitioner herein, requests and designates the following:

Page 94, beginning with the words "T. J. Van Meter, called for the plaintiff, testified" to and including the first seven lines on Page 99.

Page 192, Instruction No. 11, requested by respondent, followed by the notation consisting of three lines, commencing with the words "Said instructions" and concluding with the words "Exception was allowed."

Beginning on Page 45, line 17, with the words "The three doctors" and ending with the words on Page 47 in the fourth line from the bottom, "They have been changed."

Page 108, beginning with the words "Doctor Mary Killeen" down to and including on Page 124 the words "Judge Helsell, I want a record made too, so we may as well (made) a record now."

Page 127, beginning with the words "Defendant's evidence" in the middle of the page, down to but not including the words on Page 164 in the seventh line from the bottom, "B. C. Beach, examined for the defendant, testified."

300 Page 203, beginning with the words "Motion for a new trial and in arrest of judgment" down to and including on Page 209 the words "and grant a new trial."

Page 213, Court's ruling on motion for new trial and in arrest of judgment, in the following words: "and upon the 1st day of August, 1919, the motion for new trial and in arrest of judgment as amended was over-ruled, to which ruling and each part thereof, the defendant duly at the time excepted, and exceptions were allowed."

W. L. FRIERSON,
*Solicitor General;*
JAMES C. DAVIS,
*General Counsel,*
*For U. S. Railroad Administration.*

301 [Endorsed:] File No. 27,962. Supreme Court U. S., October Term, 1920. Term No. 605. Arthur J. Dahn, Petitioner, vs. Director General of Railroads. Designation by respondent of additional parts of record to be printed. Filed Feb. 14, 1921.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1921.

No. 166.

ARTHUR J. DAHN, PETITIONER,

vs.

JAMES C. DAVIS, AGENT DESIGNATED BY THE PRESIDENT, UNDER SECTION [illegible] OF THE TRANSPORTATION ACT, APPROVED FEBRUARY 28, 1920, RESPONDENT.

## BRIEF FOR PETITIONER.

WALTER G. CLEPHANE,
J. WILMER LATIMER,
*Attorneys for Petitioner.*

[illegible] PRINTING COMPANY, [illegible] STREET NORTHWEST, WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1921.

No. 166.

ARTHUR J. DAHN, PETITIONER,

*vs.*

JAMES C. DAVIS, AGENT DESIGNATED BY THE PRESIDENT, UNDER SECTION 206 OF THE TRANSPORTATION ACT, APPROVED FEBRUARY 28, 1920, RESPONDENT.

## BRIEF OF PETITIONER.

### Statement of Facts.

Petitioner was a railway mail clerk in the employ of the United States Government. He brought this action in the District Court of the United States for the Northern District of Iowa, against the Illinois Central Railroad Company and the Director General of Railroads of the United States, to recover damages for personal injuries sustained May 29, 1918, while engaged in the performance of his duties on a mail car attached to a train on the lines of the Illinois Central Railroad Company. Said railroad was being operated at the time under the direction of the Director General of Railroads (Rec., p. 2). The car was wrecked by plunging through a bridge constituting part of the roadbed of said railroad company, and plaintiff was seri-

ously and permanently injured (Rec., pp. 32-38). The negligent acts charged were:

(*a*) The dangerous and unsafe construction and maintenance of the said railway bridge.

(*b*) The operation of the train at an excessive and unsafe rate of speed.

(*c*) The failure to adequately patrol the track and give proper warning of its dangerous condition (Rec., pp. 2-3).

The petition alleged diversity of citizenship, and invoked federal jurisdiction on that ground (Rec., p. 2). Counsel for the Director General conceded the allegations of the petition in this regard to be true (Rec., pp. 39-41).

The Director General in his answer denied petitioner's allegations of negligence and the extent of petitioner's injuries, and also contended (Rec., pp. 19-21):

(*a*) That the suit is in effect an action against the United States Government, which is not liable in such a case.

(*b*) That the plaintiff, being an employee of the United States, had prior to the commencement of the action, applied for and received the benefits of the Federal Employees' Compensation Act, and that this constituted an election to proceed exclusively under that act and barred his right to recover in this suit.

(*c*) That any recovery which might be had in this suit, would be a recovery from the United States Government and, under the terms of the Federal Employees' Compensation Act, the amount of such recovery would have to be refunded to the Government, so that in no event could the petitioner benefit thereby.

The Illinois Central Railroad Company filed no answer because, on motion of the two defendants (Rec., pp. 4-7), that company was dismissed from the cause

(Rec., p. 8) on the ground that under "General Order No. 50" (Rec., pp. 7-8) issued by the Director General of Railroads, suits could not be brought against a railroad company "controlled and involuntarily taken over by the United States" (Rec., p. 4), and that under the terms of that order suit should be brought against the Director General alone (Rec., pp. 4-5).

Defenses (*a*), (*b*) and (*c*) above mentioned were presented to the District Court by appropriate demurrers, and the points thus raised were decided against the Director General. To these rulings exceptions were duly taken. The case was tried before a jury upon the issues joined as to the allegations of negligence and extent of injuries, and plaintiff recovered a verdict in the sum of seven thousand five hundred ($7,500) dollars (Rec., p. 89).

The Director General appealed from the judgment of the District Court entered upon the verdict of the jury, to the United States Circuit Court of Appeals for the Eighth Circuit (Rec., p. 95), and that court on August 2, 1920, reversed the judgment below, and remanded the case *with directions to dismiss the complaint* (Rec., pp. 110, 111).

**Assignment of Errors (Rec., pp. 111, 112).**

The errors of the Circuit Court of Appeals relied upon are as follows:

1. In entering judgment reversing the judgment of the District Court of the United States for the Northern District of Iowa and in remanding the case with directions to dismiss the complaint.

2. In not affirming the judgment of the United States District Court aforesaid.

5. In holding that petitioner having applied for and received compensation under Chapter 458 of the First Session of the Sixty-fourth Congress, 39 Statutes,

page 742, is barred from maintaining this suit (Rec., p. 109).

6. In holding and deciding that, as to the United States, the Employees' Compensation Act aforesaid is exclusive of the right to sue the carrier under Federal control if the employee (in this case the petitioner) elects to pursue the remedy under it, and that he can not pursue any other remedy (Rec., pp. 109, 110).

7. In rendering judgment against this petitioner (former defendant in error) for costs of suit in said Circuit Court of Appeals.

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## ARGUMENT.

### First Assignment of Error.

It is believed that the action of the Circuit Court of Appeals in remanding the case to the District Court *with directions to dismiss the complaint* (Rec., pp. 110, 111), is so palpably error as to require no argument. This honorable court in the case of Slocum *vs.* New York Life Insurance Company, 228 U. S., 364, 57 L. Ed., 879, said with regard to a similar mandate (pp. 398, 399):

> "In the present case certain well defined issues of fact were presented by the pleadings, which the plaintiff, as also the defendant, was entitled by the constitution to have tried to the court and a jury. Such a trial was had and resulted in a general verdict resolving all the issues in the plaintiff's favor. That verdict operated, under the constitution, to prevent a re-examination of the issues save on a new trial granted by the trial court in the exercise of its discretion, or ordered by the appellate court for error of law. . . . The reversal operated to set aside the verdict and to put the issues at large as they were before it was

given. But, instead of ordering a new trial, as was required at common law, the Circuit Court of Appeals itself re-examined the issues, resolved them in favor of the defendant, and directed judgment accordingly. This, we hold, could not be done consistently with the Seventh Amendment, which not only preserves the common law right of trial by jury, but expressly forbids that issues of fact settled by such a trial shall be re-examined otherwise than 'according to the rules of the common law.' "

**Assignments of Error Nos. 2, 5, 6 and 7.**

These assignments will be discussed under three heads, to wit:

**A.**

**IS THE DIRECTOR GENERAL OF RAILROADS LIABLE IN AN ACTION OF THIS CHARACTER WHEN A CLAIMANT HAS NOT AVAILED HIMSELF OF THE BENEFITS OF THE FEDERAL EMPLOYEES' COMPENSATION ACT?**

**B.**

**THE FIRST QUESTION BEING ANSWERED IN THE AFFIRMATIVE, DOES THE RECEIPT OF BENEFITS UNDER THE COMPENSATION ACT CONSTITUTE AN ELECTION SO AS TO BAR A CLAIMANT OF HIS REMEDY?**

**C.**

**THE SECOND QUESTION BEING ANSWERED IN THE NEGATIVE, MUST CLAIMANT REFUND TO THE GOVERNMENT THE ENTIRE AMOUNT RECOVERED?**

Taking up these questions in the order above stated:

A.

## IS THE DIRECTOR GENERAL OF RAILROADS LIABLE IN AN ACTION OF THIS CHARACTER WHEN A CLAIMANT HAS NOT AVAILED HIMSELF OF THE BENEFITS OF THE FEDERAL EMPLOYEES' COMPENSATION ACT?

To determine what right of recovery there may be for injuries received on railroads under the operation of the Director General of Railroads, resort must be had to Section 10 of the Act of March 21, 1918, known as the Federal Control Act (40 Stat., 451). This section provides:

> "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. *Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.* Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no

> process, mesne, or final, shall be levied against any property under such Federal control." (Italics ours.)

It has been contended by the respondent that when the Federal Control Act provided that—

> "Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government" (sec. 10),

the word "carrier" must be held to refer to the railroad company which had been operating the road prior to Federal control, and that inasmuch as it had been decided that such an interpretation would make the act unconstitutional, there is no support for the view that this section authorizes suits to be brought against the Director General. The argument is that if the word "carrier" is construed to mean solely the companies whose lines have been taken over by the Federal Government it would not be within the power of Congress to subject them to liability which might arise during their operation under Federal control, because "such an act would be an arbitrary exercise of legislative power contrary to the established principles of private rights and distributive justice and tantamount to a denial of due process of law" (Vaughn's case, 81 South., 417).

The principle is so firmly settled in our jurisprudence as to admit of no denial, that, if possible, every act of Congress should be given a construction that would render it constitutional rather than unconstitutional. If the word "carrier" can properly be construed, not to refer to the *companies* whose lines were, within the purview of section 10, to be operated under Federal control,

but to the transportation systems operated by the Director General, no criticism against the constitutionality of the act can properly be made.

It had been previously decided in this case upon the motion of the Director General (Rec., pp. 4-8), that the railroad could not defend, but that the only defendant must be the Director General. Having accomplished the dismissal of the railroad company from the suit, the Director General than advanced what the annotator in the note in 8 A. L. R., 969, calls "the novel proposition," that because the suit is now against the Director General alone it *can not be maintained at all*, because this would amount to permitting the United States to be sued.

Since the decision of this case below, this honorable court has conclusively settled this proposition in favor of the contention which is now being made by petitioner. In the case of Mo. Pac. R. R. Co. et al., *vs.* Ault, decided June 1, 1921, this court said, construing section 10 of the Federal Control Act above referred to:

> "The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such rights or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917; to cases where the cause of action arose before that date and the suit against the company was filed after it; and to cases where both cause of action and suit has arisen or might arise during federal operation. The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers.

The situation was analogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with carriers were not to be affected by the change of control.

"'This purpose Congress accomplished by providing that 'carriers while under federal control' should remain subject to all then existing laws and liabilities and that they might sue and be sued as theretofore. Here the term 'carriers' was used as it is understood in common speech; meaning the transportation systems as distinguished from the corporations owning or operating them. Congress had in Section 1 declared that such was its meaning. The President took over the physical properties, the transportation systems, and placed them under a single directing head; but he took them over as entities and they were always dealt with as such (Bull. No. 4, p. 113). Each system was required to file its own tariffs. General Order No. 7, Bull., 4, p. 151. Each was required to take an inventory of its materials and supplies. General Order No. 10, id. p. 170. Each Federal treasurer was to deal with the finances of a single system; his bank account was to be designated '(Name of Railroad), Federal Account.' General Order No. 37, id. p. 313. Each of 165 systems was named individually in the order promulgating the wage awards of the Railroad Wage Commission. General Order No. 27, id., pp. 198, 200. And throughout the orders and circulars there are many such expressions as 'two or more railroads or boat lines under federal control.' See General Order No. 11, id. p. 170. It is this conception of a transportation system as an entity

which dominates Section 10 of the Act. The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or execution upon their property was precluded as inconsistent with the Government's needs, the liability of the transportation system was to be enforced by allowing suit to be brought against whomever, as the party operating the same, was legally responsible under existing law, although it be the Government.

"Thus, under Section 10, if the cause of action arose prior to government control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the Government, save for the immunity of the physical property from levy and the power of the President to regulate suits in the public interest as by fixing the venue, or the time for trial. If the cause of action arose while the Government was operating the system the carrier while under federal control was nevertheless to be liable and suable. This means, as a matter of law, that the Government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts. See Gracie *vs.* Palmer, 8 Wheat., 605, 632, 633, 5 L. Ed., 696, 703."

It would seem that the Director General of Railroads must have had the same idea in mind when he promulgated his General Order No. 50, which contained the following provisions: (Rec., pp. 7, 8).

"It is Therefore Ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the pos-

session, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures.

"Subject to the provisions of General Orders numbered 18, 18-A, and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceedings may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

The decision in the Ault case makes it unnecessary to cite the numerous decisions of the State and Federal courts which also support the view for which petitioner is here contending.

B.

## DOES THE RECEIPT OF BENEFITS UNDER THE COMPENSATION ACT CONSTITUTE AN ELECTION SO AS TO BAR A CLAIMANT OF HIS REMEDY?

If this were a suit against the Government of the United States in the ordinary sense, so that a judgment would have to be paid out of its public moneys derived through its taxing power and other ordinary sources of revenue, then it would follow that the judgment in this case would be paid out of the public moneys generally, the same source from which beneficiaries under the Compensation Act derive their compensation. This, however, is not the case. The railways while under Federal control were never considered to be an integral part of the Governmental system. In consenting that the Director General might be sued, Congress provided in the Control Act an elaborate scheme whereby judgments should be paid out of the railway operating income under the rules of the Interstate Commerce Commission.

Section 12 of the Control Act, dealing with the disposition of the revenue derived from the operation of the roads during Federal control, enacts that (40 Stat., 457):

> "Unless otherwise directed by the President, such moneys shall not be covered into the Treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before the Federal control. Disbursements therefrom shall, without further appropriation, be made in the same manner as before Federal control and for such purposes as under the Interstate Commerce Commission classification of accounts in force on December twenty-seventh, nineteen hundred and seventeen, are chargeable to operating expenses or to railway tax accruals and for such other purposes in connection with Federal control as the President may direct. . . ."

As showing that this judgment would, in regular course, under the rules of the Interstate Commerce Commission be paid as part of the "operating expenses" mentioned in the act, before being covered into the United States Treasury, an extract is here inserted from the opinion of the District Court (La.), in Johnson *vs.* McAdoo, 257 Fed., 757:

> "It will be incumbent upon the Director General to defend the suit, and to make such payment, in the event of a recovery, out of his receipts. Section 12 of the act provides that the moneys received by the Director General shall not be covered into the Treasury of the United States, but shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner, as before Federal control. Under the orders of the Interstate Commerce Commission judgments for damages are chargeable to the operation of the roads and are payable out of the general receipts. There is no doubt that the same action will follow in the event of a recovery in this case, as if the roads were not under Government control, and the question of an adjustment as between the Government and the railroad is one that will come up and be settled when the roads are turned back to their owners or other disposition made of them."

The compensation to be paid by the United States to a railroad is an amount "not exceeding a sum equivalent as nearly as may be to its average annual operating income for the three years ended June thirtieth, nineteen hundred and seventeen," and it is only such operating income "in excess of such just compensation" as remains the property of the United States (40 Stat., 452). In determining the "average annual railway operating income" which is to be the basis of payment, judgments against the roads have, under the rules of the Interstate Commerce Commission, been deducted. (Johnson

*vs.* McAdoo, *supra.*) The act also puts Federal taxes on the same basis, and provides a similar deduction for them (40 Stat., 452). So far as known, it has never been contended that the Federal taxes assessed against the railroads are paid from the Government's own treasury.

As was said by the court in Haubert *vs.* B. & O. R. R. Co., 259 Fed., 361:

> "It will not be assumed that the United States will terminate Federal control and cover into the United States Treasury the residue of the revolving fund and excess income, if any, without providing for debts and liabilities incurred during Federal control."

If executive construction of the Control Act be resorted to there is ample support for this position. On July 31, 1918, the Comptroller of the Treasury said:

> "Whatever the future of railroad control may be it is certain that at present the railroads are not considered an integral part of the Government system but are operated as common carriers subject to all existing laws, State and Federal, and that their status is the same as prior to the executive order with the exception of the supervisory control of the Government to secure war needs."

There is, therefore, not the same reason for a statutory application of the doctrine of election under these circumstances as exists in the case of the ordinary private employer. Possibly partly for this reason and certainly for other reasons hereinafter set forth, Congress has not seen fit to require an election to be made.

Section 10 of the Control Act which has already been quoted, enacts that—

> "Actions at law or suits in equity may be brought by and against such carriers and judgments rendered *as now provided by law.*" (Italics ours.)

Unless there was something in the Compensation Act requiring an election to be made between the right to compensation under that act and to sue for damages for injuries committed by a third party, it would seem clear that petitioner's rights remained unimpaired by the Control Act.

It should be borne in mind that the Compensation Act was approved September 7, 1916, prior to the time of the passage of the Control Act, and at a time when a postal clerk unquestionably had a right of action against a railway company by whose negligent act he was injuried, *but had no redress of any kind against the United States for its negligent act.*

Bigby *vs.* U. S., 188 U. S., 400, 47 L. Ed., 519.

The mind at once leaps to the question whether it can be possible that Congress intended that, by the mere act of taking the railroads under Federal control as an emergency measure, a railway mail clerk should thereby be deprived of his theretofore unquestioned property right to sue and recover for injuries received through negligence such as was charged and proved in this case.

The answer to this question must be in the negative, because—

1st. *There is nothing in either the Control Act or the Compensation Act to require an election.*

2d. *If the language of Section 10 is ambiguous, the history of the legislation can be resorted to. This shows that such a result was never so intended.*

3d. *The Federal Employees' Compensation Act differs in important particulars from the legislation of those state and English and Scotch Acts cited by the court below.*

1.

**1st. There is Nothing in the Control Act or Compensation Act To Require An Election.**

When the Compensation Act was passed the United States could not be sued for torts committed by it. Obviously, therefore, there was no occasion to insert in the act any provision to the effect that the reception of benefits under it was a waiver of any right of action against the United States. The act did, however, carefully preserve the rights of beneficiaries thereunder to present claims and to institute suits against defendants "other than the United States," even to the extent of permitting the commission to require the beneficiary to assign to it any such claim, and conferring authority upon such commission to thereafter prosecute or compromise such claims. (Section 26, 39 Stat., p. 747.) There is no significance in the language "other than the United States." This is substantially the phrase which is almost universally used in the compensation acts of the various States, providing as they do, for the assignment to the employer of claims by the employee against third parties, so that the employer may be subrogated *pro tanto* to the extent of payments made by him. The language in these acts is usually "other than the employer." The Federal Act which followed the various State Acts, adopted substantially the same phraseology. See:

Sec. 2477*m* 6 Iowa Statutes.
Ill. Compensation Act, Laws 1911, p. 316, et seq.
Texas Gen. Laws, 1917, p. 285, Vernon's Anno. Civil Code Stat. Supp., 1918, Art. 5246-47.
Black *vs.* Ch. & G. W. R. R. Co., 174 N. W., 774.
So. Surety Co. *vs.* Ry., 174 N. W., 329.
Lancaster *vs.* Hunter, 217 S. W., 765.

It is true that Section 7 of the Compensation Act is in the following language:

> "So long as the employee is in receipt of compensation under this act, or if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which said installment payments would be continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever, except pension for service in the Army or Navy of the United States."

Plainly this does not prevent a claim being made against the United States, because it only precludes the making of such a claim "so long as the employee is in receipt of compensation under this act," or "until the expiration of the period during which such installment payments would be continued." At the end of these periods he is left free to pursue any remedy he might have, if any such exists.

Furthermore, the meaning of the word "remuneration" as used in the act is clearly limited by the words "salary" and "pay" which are used in conjunction with it. It is well settled that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.

> Wilson *vs.* Sandford, 10 How., 99, 101, 13 L. Ed., 344.
> U. S. *vs.* Bevans, 3 Wheat., 336, 389, 4 L. Ed., 404.
> Alabama *vs.* Montague, 117 U. S., 602, 609, 611, 29 L. Ed., 1000.
> 36 Cyc., 1119-1120.

The clear intention here seems to be that while receiving the "compensation" provided by the act, the em-

ployee is to receive nothing in the nature of salary; he is to be cut off the payroll except as to the pay already accrued for services performed. The act is pensional in character and is in the nature of accident insurance furnished by the Government to its employees.

The Compensation Act itself bears further internal evidence of the correctness of the construction here contended for. Section 41 of the act provides (39 Stat., 750):

> ". . . That if an injury or death for which compensation is payable under this act is caused *under circumstances creating a legal liability in the Panama Railroad Company to pay damages therefor* under the laws of any State, Territory, or possession of the United States or of the District of Columbia or of any foreign country, no compensation shall be payable until the person entitled to compensation releases to the Panama Railroad Company any right of action which he may have to enforce such liability of the Panama Railroad Company, or until he assigns to the United States any right which he may have to share in any money or other property received in satisfaction of such liability of the Panama Railroad Company." (Italics ours.)

This language is significant. The Panama Railroad Company was the only railroad owned and controlled entirely by the Federal Government when the Compensation Act was passed, and the foregoing language of Section 41 is eloquent proof that Congress recognized the right of action on behalf of a Government employee, notwithstanding such absolute Government control and ownership. It is clear from this language that Congress had no thought that the right to compensation provided by the act was exclusive of any other remedy against the railroad company, even though the Government did absolutely own and control it.

**2d. If the Language of Section 10 of the Control Act is Ambiguous the History of the Legislation Can Be Resorted To. This Shows That Such a Result Was Never Intended.**

Should any doubt remain as to whether the Government intended to prohibit suits against the Director General by its own employees for torts committed by railways, that doubt is removed by a perusal of the reports of the hearings before the committees of Congress having the matter under discussion, which reports may be regarded as an exposition of the legislative intent.

> Duplex Print. Press Co. *vs.* Deering et al., 254 U. S., 443.

When the Federal Control Bill was being considered by the House of Representatives Committee on Interstate and Foreign Commerce, the question now before the court was the subject of elaborate discussion, the report of which will be found in "Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, Sixty-fifth Congress, Second Session, on H. R. 8172," published by the Government Printing Office. As originally drafted, the bill contained the following section then numbered 9.

> "That the President is hereby authorized while carriers are under Federal control to direct that the Federal Workmen's Compensation Act of September nineteen hundred and sixteen, shall be extended so as apply to carrier employees, on such terms and conditions as will give due consideration to remedies available under State compensation laws or otherwise" (page 5).

The Federal Employees' Compensation Commission had previously held that railway employees were already by reason of the President's proclamation taking over the railroads, employees of the United States and so entitled to compensation (pp. 3, 95, 106). In this respect

they were considered to stand, therefore, in precisely the same relation to the Government as did mail clerks of whom petitioner was one.

It was then proposed to add to this section 9 the following (page 688):

> "The rights and remedies so provided shall exclude all other rights and remedies of the person injured, his personal representatives, dependents, or next of kin, either at common law or by statute, whether Federal or State, against either the carrier or the United States, on account of such injury or on account of the disability or death resulting therefrom."

The present section 10 which has been already discussed was then a part of the bill and numbered 11 (page 5).

Mr. Doak, a representative of the Brotherhood of Railway Trainmen, appeared before the committee (page 687) and vigorously protested against the inclusion in the bill of the language last quoted on the ground that it would deprive employees of a very valuable right then possessed by them. As a result of his protest the *entire proposed section 9 was omitted*, the first sentence as unnecessary, and the second as taking away a valuable right of the employees, which the committee deemed it unwise to do. Notwithstanding this, the substantial provisions of section 11 were retained in the act as section 10 (see pages 574-589; 687-703). Mr. Doremus, a member of the committee, in order to show the effect of this omission asked Mr. Doak the following question, to which Mr. Doak replied in the affirmative:

> "Mr. Doremus: Then with section 9 stricken out, the rights of the employees upon railroads in this country—their right of action in all our courts, both common law and statutory—will be preserved as fully as those who are seeking for injuries to private property?
>
> "Mr. Doak: That is our position."

It is not practicable to attempt further quotations from the record of these hearings. The foregoing shows that the question of the right of railroad employees to sue for injuries received while the roads were under Federal control was thoroughly considered. And one can not doubt, after reading this record of the hearings before the House Committee, and considering the text of section 10 of the act as it finally passed, that its framers intended to make it broad enough to permit railroad employees (even though they became technically employees of the Government) as well as anyone else who suffered an injury because of the negligence in the operation of railroads under Federal control, to resort to the courts for redress, just as they could have done before the roads were placed under such control.

It is also significant that Congress, which, at the time of the passage of the Compensation Act, had clearly in mind the principle that suits might be maintained which would involve loss to the Government growing out of the Government control of railroads, a few months later, when the Control Act was passed, deliberately refrained from inserting a provision for an assignment of rights of action for liabilities for torts, except to the limited extent of reimbursing the Government only the *amounts paid under the Compensation Act, and expressly allowed the injured employee the balance.*

It has been observed that the Compensation Act contained a provision forbidding the payment of compensation under circumstances creating a legal liability against the Panama Railroad Company until the claimant should have released such right or assigned it to the Government, and that the Control Act omitted such a feature. One reason for the difference between the two laws seems perfectly plain. In the case of the Panama Railroad the United States, while not a nominal or real defendant (Panama Railroad Co. *vs.* Curran, C. C. A.,

5th Circuit, 256 Fed., 768), would be obliged to pay the amount of any judgment recovered against the railroad company because of its ownership of the entire capital stock therein. In case of judgments against the Director General of Railroads for torts committed by the roads only temporarily under his control, as has hereinabove been pointed out, it was contemplated that the judgment would be paid as part of the operating expenses of the road, and would not come out of the United States Treasury.

From the omission in the Control Act of a provision similar to the one relating to the Panama Railroad in the Compensation Act the conclusion seems unescapable that Congress deliberately chose not to subject plaintiffs to the doctrine of election.

It is clear that at the time the Federal Control Act was passed, the petitioner, a railway mail employee, had the right to sue the Illinois Central Railroad Company for any injury which might have resulted to him from its negligence. Any cause of action in his favor created a legal liability against some party "other than the United States." Section 10 of that act definitely allowed actions to be brought against carriers and "judgments rendered as now provided by law;" and enacted that "in any action at law or suit in equity against the carrier, no defense shall be made thereto on the ground that the carrier is an instrumentality or agency of the Federal Government." This section indicates that the rights theretofore existing in Federal employees to sue railroad companies were not affected by the Railroad Control Act. As was said by this honorable court in Mo. Pac. R. Co. *vs.* Ault, *supra*:

> "The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of

> carriers. . . . The courts were to go on entertaining suits and entering judgments under existing law but the property in the hands of the President for war purposes was not to be disturbed. *With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control.*" (Italics ours.)

Unless, therefore, there is something in the general purpose of the Employees' Compensation Act, or something which by necessary implication is read into that act, to bar the petitioner's remedy by reason of his acceptance of benefits thereunder, it is submitted that the learned court below erred in its conclusions in this regard, which it briefly stated in the following language (Rec., pp. 109, 110):

> "That the employee can not recover both damages and compensation is sustained by the following cases: Barry *vs.* Bay State Ry. Co., 222 Mass., 366, 110 N. E., 1031, 1032; Turnquist *vs.* Hannon, 219 Mass., 560, 107 N. E., 443; Cripp's Case, 216 Mass., 586, 104 N. E., 565; Ann. Cas., 1915B 828; Pawlak *vs.* Hayes, 162 Wis., 503, 156 N. W., 464; McGravey *vs.* Independent Oil, etc. Co., 156 Wis., 580, 146 N. W., 895; Woodcock *vs.* London, etc. R. Co. (1913), 3 K. B., 139, 6 Butterworth's Workmen's Compensation Cases, 267; Page *vs.* Burtwell (1908), 2 K. B., 758, 1 Butterworth's Workmen's Compensation Cases 267; Oliver *vs.* Nautilus Steam Shipping Co. (1903), 2 K. B., 639, 5 Minton-Senhouse's Workmen's Compensation Cases 65; Huckle *vs.* Council, 4 Butterworth's Workmen's Compensation Cases, 113, (aff 3 Butterworth's Workmen's Compensation Cases), 536, 26 T. L. R., 580; Mahomed *vs.* Maunsell, 1 Butterworth's Workmen's Compensation Cases, 269; Murry *vs.* North British R. C., 41 Scottish Law Rep., 383; Mulligan *vs.* Dick, 41 Scottish Law Rep., 77; Tong *vs.* Great Northern R. Co., 4 Minton-Senhouse's Workmen's Com-

pensation Cases, 40, 86 L. T. Rep. N. S., 802; Workmen's Compensation Acts; Corpus Juris Treatise."

**3d. The Federal Employees' Compensation Act Differs In Important Particulars From the Legislation of those state and English and Scotch Acts Above Cited by the Court.**

It is submitted that none of the cases referred to sustains the proposition of the court quoted above. It is believed that the court was misled by the fact that, in some of the Workmen's Compensation Acts, including those referred to by the court in its opinion, there is an *express provision that acceptance of benefits under the act constitutes a waiver of the right to sue the employer.* With regard to the usual compensation act, it may be said that the employee has two remedies, one against the employer under the common law, in which case certain defenses are available to the employer, such as contributory negligence, negligence of fellow servant, assumption of risk, etc., and in which the plaintiff must prove negligence; and the other under the Compensation Act, in which the employer is deprived of these defenses and in which the employee recovers without proof of negligence. In the latter the compensation received by the employee is usually much less than would be received through litigation, but the result is generally much more expeditiously reached, and payment is assured. In the latter, too, the plaintiff has no right of trial by jury, while if he pursues his common law remedy, he has. It is, therefore, a feature of some of these acts that the resort to the remedy under the statute constitutes a waiver of the right to sue the employer at law, and this is in these acts expressly so stated.

In all the States, however, with the exception of Arizona and New Hampshire only, the election must be

made *before the injury*. (Bulletin U. S. Bureau of Labor Statistics, No. 275, p. 41, September, 1920.)

Petitioner contends that plaintiff can recover in this case because of the express provision of Article 10 of the Control Act, which, as it has been shown, was never intended to and did not abrogate his rights under the Compensation Act. It is not required that the United States "pay both compensation and damages for negligence to the same person for the same injury," as suggested by the learned court below (Rec., p. 109). Whatever damage he may recover against the tort feasor inures to the benefit of the United States to the extent of any compensation paid the employee under the act, so that in no event can the United States be harmed by the mere fact that the employee has availed himself of the benefits of the Compensation Act.

An examination of the cases referred to by the court below as supporting its conclusion that an election has taken place here which has barred the plaintiff's remedy in this suit will show that in each of the States concerned there is an express *statutory* provision to the effect that the acceptance of benefits under the act is a waiver of the common law right. For instance, section 15 of the Massachusetts Act upon which the decision in Turnquist *vs.* Hannon, *supra*, was based, enacts that "the employee may at his option proceed either at law against that person to recover damages or against the association for compensation under this act, *but not against both.*" 219 Mass., 560, 107 N. E., 443. (Italics ours.)

In Shade *vs.* Ashgrove Lime, etc. Co., supra, also cited by the court below in support of its opinion, the court said, construing the Kansas Legislation there involved:

> "*While it is true that such compensation acts do not exclude other remedies in the absence of provisions to that effect*, yet by the terms of the statute itself,

such remedies are excluded when both employer and employee are under its provisions." (Italics ours.)

92 Kans., 146, 139 Pac., 1193.

This citation, therefore, is authority for the converse of the proposition decided by the learned court below.

The question of liability of a tort feasor for damages, after payment of compensation under compensation acts which do not provide that acceptance of benefits constitutes a waiver of the common law right, was twice before the Supreme Court of Iowa in 1919. The Iowa Act did *not*, as do many of the State statutes, require an election to be made. The cases, therefore, are authority for the proposition for which petitioner is now contending. The court said, in Southern Surety Co. *vs.* Chic. St. P., M. & O. Ry. Co., 174 N. W., 329:

> "In an action at common law, the injured party is entitled to recover all that the common law recognizes as proper to be recovered in suits of that kind. This includes compensation for the injury, loss of time, medical care, and treatment, and all other injuries which are shown to flow as a proximate result of the wrong done. The fact that the injured party proceeded against his employer, and secured compensation under the act, can not be pleaded by the wrongdoer when suit at common law is instituted against him. He is liable for the full amount of the damage, regardless of any rights the injured party has against his employer, or may have had under the act. Nowhere in the act does it say that the amount of recovery against the actual wrongdoer shall be diminished in any degree, by the fact that the injured party has received, or may receive, compensation for some of the wrong, through his employer, under the act. *The obligation of the wrongdoer is the same as if there were no Workmen's Compensation Act.* Compensation is one thing, and damages another. He recovers from the

> wrongdoer all the damages that he sustained by reason of its wrongful act. He recovers only such compensation from his employer as is provided for in the statute." (Italics ours.)

When the same question came before the court a second time, in Black *vs.* Chic. G. W. Ry. Co., 174 N. W., 774, the court drew attention to the divergence between the statutes of certain other States and its own, and reaffirmed the doctrine previously announced in Southern Surety Co. *vs.* Chic. St. P. M. & O. Ry. Co., *supra.*

## C.

## MUST THE CLAIMANT REFUND TO THE GOVERNMENT THE AMOUNT RECOVERED?

Perhaps the reason why the learned court below gave such scant consideration to the doctrine of election, was *its conclusion that any recovery of damages by a party who has availed himself of the benefits of the Compensation Act inures to the benefit of the United States and the employee realizes nothing.*

Its language as it appears on pages 108 and 109 of the record is here quoted:

> "It plainly appears from the statute above quoted" (the Compensation Act) "that whether the employee assigns his cause of action against a person other than the United States, to the United States, and the same is prosecuted by said commission or whether the employee prosecutes the cause of action himself, the employee gains nothing but the whole recovery after deduction of the expense of litigation either goes into the compensation fund out of which employees are paid or is retained by the employee and the amount thereof is credited to the United States on future payments. So that in any event the employee realizes nothing from the liability of a person other than the United States. In this

> very case the plaintiff would receive nothing if he should collect his judgment other than his compensation under the Compensation Act."

It is respectfully submitted that this conclusion was neither a necessary nor logical step to the final result reached by the court. But the conclusion once reached made the whole case merely a moot one.

The language of the statute is so plain, that, with all due respect to the court below, it would seem that the statute must have been inadvertently misread by it.

The act (sections 26-27, 39 Stat., 742, 747), provides for two situations, 1st: the resort by the beneficiary to the Compensation Act prior to suit, in which case the commission may require him to assign his right of action to the United States; and 2d: the resort to the Compensation Act after recovery by suit, compromise or other wise. In the first case the amount realized by the commission as a result of the assignment and prosecution of the action shall be applied in the following manner (p. 747):

> "After deducting the amount of any compensation already paid to the beneficiary and the expenses of such realization or collection, which sum shall be placed to the credit of the employee's compensation fund, *the surplus, if any, shall be paid to the beneficiary* and credited upon any future payments of compensation payable to him on account of the same injury." (Italics ours.)

In the second case it is provided that (p. 748):

> "Such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:
>
> "(*A*) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any sur-

plus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund."

"(*B*) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury."

Thus the law expressly requires the United States, in the first case to *refund to the beneficiary all the recovery except the amount paid him under the Compensation Act*, and in the second case, *permits the beneficiary to retain all except the amount which has been paid or may be payable to him under the Compensation Act.*

This case seems to have been decided by the court below in accordance with what it conceived to be the analogy between the Federal Compensation Act and the usual State Compensation Laws.

It will not be denied that it was within the power of Congress to enact legislation which in express terms would have deprived a claimant receiving benefits under the compensation law, from directly or indirectly recovering from a third party, and thereafter retaining, any amount in excess of that received under the Compensation Act. It is equally within the power of the States so to do. (N. P. Ry. Co. *vs.* Meese, 239 U. S., 614, 60 L. Ed., 467.) But so far as counsel have been able to discover, such a feature is unusual in the State Compensation laws. With the exception of a very few States, it is believed that the customary legislation permits the claimant to receive and retain the benefit of any excess; and this, petitioner contends, is what the Federal Compensation Act has done. This phase of the subject will be found discussed in Bulletin of the U. S. Bureau

of Labor Statistics, No. 272, at pp. 193 et seq., published in January, 1921, wherein many instructive cases construing the various statutes are cited.

As illustrating the tendency of the courts, in case the statute is ambiguous as to the right of the injured employee to the benefit of any amount recovered from a third party in excess of the statutory amount due by his employer, the case of Houlihan *vs.* Sulzberger & Sons Co., 118 N. E., 429, may be cited. In that case the court had under consideration the Illinois Compensation Act of 1911, which as to third persons not electing to be bound by the act, is substantially the same as the present law of that State.

That act contained among others, the following sections:

> "Sec. 3. No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee other than the compensation herein provided shall be available to any employee who has accepted the provisions of this act or to anyone wholly or partially dependent upon him or legally responsible for his estate.
> . . . . . "
>
> "Sec. 17. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person, other than the employer, to pay damages in respect thereof:
>
> "(*a*) The employee or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation which he is entitled to under this act shall be reduced by the amount of damages recovered.
>
> "(*b*) If the employee or beneficiary has recovered compensation under this act, the employer by whom the compensation was paid or the person who has been called upon to pay the indem-

> nity under sections 4 and 5 of this act, may be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employee to recover damages therefor."

The court held that in spite of the provisions of section 3 above quoted, section 17 preserved the right of the employee to recover against both the employer under the Compensation Act, and the party liable for the injury and added:

> "Paragraph (*b*) provides that if the employee has recovered compensation, the employer may be entitled to indemnity from the person liable to pay damages and shall be subrogated to the rights of the employee to recover damages. *He is not entitled, however, to more than indemnity out of the damages recovered, and the subrogation must be limited to that amount.* The amount of *recovery*, however, is not so limited." (Italics ours.)

The utterances of the learned court below upon this phase of the case at bar are the more surprising because only about three years before its decision in this case, it had before it for construction the Nebraska Compensation Act which in terms permitted an employer paying compensation, to sue a third party responsible for the injury without any limitation upon the amount recoverable in the action; and it then held that where the recovery by the employer was for a larger sum than the statutory obligation under the Compensation Law, he should turn over to the representatives of the deceased employee any excess remaining after deducting his own payment and the costs of the proceedings, such excess to go as an added benefit to the beneficiaries under the compensation law.

> *Otis Elevator Co.* vs. *Miller & Paine, 240 Fed., 376.*

From the Bulletin of Labor Statistics above mentioned the following illustrations are taken:

The Ohio Statute (Acts, 1911, p. 524, amended Acts, 1913, pp. 72, 396) permits employers to act as self-insurers on a showing of financial ability, etc. No provision as to injuries by third parties appears in the law, and the Industrial Commission of the State has ruled that an employee injured by the negligence of a third party might proceed both against such party for damages and against his employer for compensation under the act. (Bulletin of U. S. Dept. of Labor Statistics, No. 272, January, 1921, page 195.)

In West Virginia, as in Ohio, the law omits all reference to injuries due to the negligence of third parties, and the Supreme Court of that State decided (Mercer *vs.* Ott, 89 S. E., 952), that the personal representative of a man killed by the fault of a third party, might recover against the latter, the right to compensation from the employer under the law being unimpaired thereby; the court stating that this decision was based "upon principles of common law."

The Kentucky statute differs from the foregoing in that it permits the injured man to sue the third party and also seek compensation from his employer; but the employer is subrogated to the employee's rights to the extent of any compensation paid by him. This is held in no way to limit the amount of the employee's recovery against the third party (Book *vs.* Henderson, 197 S. W., 449). The employer should interplead and set up his cause of action, whereupon it would be the duty of the court to apportion between the employer and the employee the damages recovered; or if the employer did not seek to recover, the third party would be entitled to have credited on his judgment any sum received by the employee in the form of compensation.

The holding by the learned court below that in no

event could petitioner benefit by any recovery is incomprehensible in view of the unambiguous language of the Federal Act. But the court having reached this viewpoint, it is not remarkable that the vital point in the case (which in the mind of the court had become purely a moot question) should have received little consideration.

The court below appears to have been impressed with the idea that if recovery were allowed in this case, the employee would recover *double compensation*, one under the Compensation Act, and one in the courts for negligence. It is believed that the error of this view has been clearly demonstrated, and that this court will be convinced, from the terms of the act itself, that petitioner must reimburse the Compensation Commission from the amount recovered in this suit for the amount paid him by it, and that petitioner would retain only the surplus.

**Effect of Decision.**

This decision, if unreversed, will have the effect of revolutionizing the practice in two of the Government Bureaus, viz: the Veterans' Bureau and the Federal Employees' Compensation Commission.

The uniform practice of both of these bureaus based upon the language of the respective acts applicable thereto, and the rulings of the legal officers thereof, has been to inform claimants that they have the right, not only to claim compensation under the Acts by virtue of which these bureaus respectively operate, but that they may, in addition, pursue their common law or statutory remedy against those responsible for injuring them. Many suits have been brought, and many claims not yet in suit are pending, upon which judgments for the claimants will be barred should the decision under review stand. The practice of these

bureaus has arisen by virtue of the language of the two statutes construed by the learned court below.

For convenience of reference a summary of the pertinent provisions of the Compensation Act is appended to this brief.

It is apparent from a perusal of this summary that the scope of the compensation payable by the Government under the Compensation Act, is very much more restricted than that authorized in actions for damages at common law. Under the act disability compensation can be paid (with certain minor exceptions) *only during a portion of the period of the continuance of the disability*, and even if the disability be *total*, the compensation *can not exceed 66⅔ per cent of the employee's monthly pay* (unless the monthly pay is under $33.33, in which case the compensation may equal the pay, and *in no event may the compensation exceed $66.67 monthly*. Even in case of death resulting from the injury the compensation paid is only a fraction of the salary *based upon a maximum monthly salary of $100* (sec. 10).

To illustrate the hardships of the rule of law laid down by the learned court below, we have, instead of resorting to hypothetical cases, taken from the records of the United States Employees' Compensation Commission the following actual cases:

James Robert Wheeler, employed at Camp Meade, was injured by the overturning of an automobile, necessitating *amputation of his leg above the knee. Compensation was paid for twenty-three days, amounting to $51.11*, and at the end of that time he was given employment at his previous salary, which discontinued his compensation. Under the rule announced by the learned court below, even if Wheeler had been injured by the negligence of a *third party*, any judgment in his favor against the tort feasor *would enure to the exclusive benefit of the Government.* The same injustice would result in the following cases:

William D. Hapgood, while working in the Springfield Armory, was injured to such an extent as to *lose an eye. He was paid for nine days disability, $16.50,* and then returned to his former occupation.

Dave Parker, injured at Fort Sam Houston, *lost his hand* by amputation. *His compensation amounted to $17.78,* in addition to which forty-five days' leave was granted.

Archie A. McCallum, injured at Puget-Sound Navy Yard, *lost three fingers and part of a fourth. Total compensation of $35.56 was paid.*

Frederick A. Porter, injured at Federal Building, Bellingham, Wash., *lost his right hand.* He took thirty-two days' leave which was due him, and *the only compensation awarded was the payment of his medical bills and the cost of an artificial limb,* as he then returned to his work.

These illustrations might be multiplied indefinitely.

The beneficiaries of the War Risk Insurance Act, the provisions of which in this respect are almost identical with the Compensation Act, are likewise affected by the decision sought to be reviewed. For example:

Suppose a widow claiming the benefits of the act, has received certain monthly payments allowed her under it, and has also recovered a large judgment against a third party responsible for her husband's death. After receiving a few monthly payments she remarries, in which event her right to compensation at once ceases. Heretofore it has been the practice for the bureau, based on a decision of the comptroller (27 Compt. Dec. part 1, p. 179, Aug. 18, 1920), to relinquish to her all of the judgment in excess of the amount due her under the War Risk Act. Should the decision of the court below be followed, that practice must be reversed and the Government must retain the entire balance of the judgment. And it may be pertinently asked whether, if this decision

stands, it will not be the duty of the Veterans' Bureau to take proceedings to recover back all moneys heretofore paid to such beneficiaries, such sums amounting, as they must, to many thousands of dollars.

Should this decision be affirmed it will be the duty of the officers in charge of the Veterans' Bureau and of the United States Employees' Compensation Commission, to advise all claimants (who are as a rule in immediate need of relief) that by accepting compensation under the acts mentioned, they thereby bar themselves from exercising their common law or statutory rights even as against private persons and corporations in no way connected with the Government. It is evident that such a warning would often defeat the very purposes of these acts.

What the decision complained of means to the petitioner will be seen from the following facts:

He was performing his duties in a mail car in the middle of the night, when suddenly there was a crash, the electric lights went out and he became unconscious. When consciousness returned, he found himself suspended underneath a window of the car, partly out. He testified (Rec., p. 33):

> "The first thing I noticed was an awful burning underneath my arms and something pinning me in the back and the shrieks of the men that died. It was very dark. . . . I was suffering intense pain."

He was confined to his bed in the hospital for two weeks, badly burned and suffering intense pain so as to retard sleep. He subsequently spent two weeks in another hospital, and had been under his physician's care up to the time of trial, during part of which time he had not been able to do more than two hours' light work a day. He wakes at night with a start, after dreaming of horrors and wrecks. He is obliged to continually wear tight bandages (Rec., pp. 32-37).

Of the eight men (Rec., p. 32) who were in the mail car three died from their injuries (Rec., p. 41).

Petitioner's pay at the time of the accident was $1,600 including an allowance of $100 for bed, etc. (Rec., p. 36). The maximum compensation which he can receive under the Compensation Act is $66.67 monthly, or $800 per year. (sec. 6). Even this pittance ceases the moment he is able to return to work and secures employment at a salary equivalent to the amount he was receiving prior to the accident; and, if his salary be not equal to that received prior thereto, his compensation, fixed by the act, is limited to 66⅔ per cent of the difference.

For those elements, therefore, that enter into a jury's award in the common law action for negligence, viz: physical pain and suffering, mental anguish, compensation for permanent disfigurement, maiming or disability, and loss of earnings, the effect of the decision below is to deprive the petitioner, and other persons similarly situated, of all compensation; and any recovery by a Government employee, on account of physical and mental suffering and of the disability sustained, from any third person or corporation whose negligence was the cause thereof, would not inure at all, under the decision below, to the benefit of the sufferer, but the whole would be covered into the Treasury of the United States.

## Conclusion.

For the reasons stated it is respectfully submitted that the judgment below should be reversed and the case remanded to the United States Circuit Court of Appeals for the Eighth Circuit with instructions to affirm the judgment of the District Court of the United States for the Northern District of Iowa.

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## APPENDIX.

## PERTINENT EXCERPTS FROM THE COMPENSATION ACT.

The Compensation Act (39 Stat., 742) contains the following provisions:

> "That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty.
>
> . . .
>
> "Sec. 3. That if the disability is total the United States shall pay to the disabled employee during such disability a monthly compensation equal to sixty-six and two-thirds per centum of his monthly pay, except as hereinafter provided.
>
> "Sec. 4. That if the disability is partial the United States shall pay to the disabled employee during such disability a monthly compensation equal to sixty-six and two-thirds per centum of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of such partial disability. The commission may, from time to time, require a partially disabled employee to make an affidavit as to the wages which he is then receiving. In such affidavit the employee shall include a statement of the value of housing, board, lodging, and other advantages which are received from the employer as a part of his remuneration and which can be estimated in money. If the employee, when required, fails to make such affidavit, he shall not be entitled to any compensation while such failure continues, and the period of such failure shall be deducted from the period during which compensation is payable to him.
>
> "Sec. 5. That if a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him, he shall not be entitled to any compensation.

"Sec. 6. That the monthly compensation for total disability shall not be more than $66.67, nor less than $33.33, unless the employee's monthly pay is less than $33.33, in which case his monthly compensation shall be the full amount of his monthly pay. The monthly compensation for partial disability shall not be more than $66.67.

. . .

"Sec. 7. That as long as the employee is in receipt of compensation under this act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for services in the Army or Navy of the United States.

"Sec. 8. That if at the time the disability begins the employee has annual or sick leave to his credit he may, subject to the approval of the head of the department, use such leave until it is exhausted, in which case his compensation shall begin on the fourth day of disability after the annual or sick leave has ceased.

"Sec. 9. That immediately after an injury sustained by an employee while in the performance of his duty, whether or not disability has arisen, and for a reasonable time thereafter, the United States shall furnish to such employee reasonable medical, surgical, and hospital services and supplies unless he refuses to accept them. Such services and supplies shall be furnished by the United States medical officers and hospitals, but where this is not practical shall be furnished by private physicians and hospitals designated or approved by the commission and paid for from the employees compensation fund. If necessary for the securing of proper medical, surgical, and hospital treatment, the employee, in the discretion of the commission, may be furnished transportation at the expense of the employees' compensation fund.

"Sec. 10. That if death results from the injury within six years the United States shall pay to the following persons for the following periods a monthly compensation equal to the following percentages of the deceased employee's monthly pay, subject to the modification that no compensation shall be paid where the death takes place more than one year after the cessation of disability resulting from such injury, or, if there has been no disability preceding death, more than one year after the injury: . . .

"(*K*) In computing compensation under this section, the monthly pay shall be considered not to be more than $100 nor less than $50, but the total monthly compensation shall not exceed the monthly pay computed as provided in section twelve."

Section 26 relates to cases in which resort is had to the Compensation Act by the beneficiary *before* suit. It provides for the disposition of the proceeds of a subsequent suit as follows:

"After deducting the amount of any compensation already paid to the beneficiary and the expenses of such realization or collection, which sum shall be placed to the credit of the employee's compensation fund, *the surplus, if any, shall be paid to the beneficiary* and credited upon any future payments of compensation payable to him on account of the same injury." (Italics ours.)

Section 27 enacts how the proceeds of a recovery in a common law action shall be applied when a *subsequent* application to the Compensation Commission is made, and enacts that:

"Such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

"(*A*) If his compensation has been paid in whole or in part, he shall refund to the United

States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

"(*B*) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury."

No. 166.

# In the Supreme Court of the United States.

OCTOBER TERM, 1921

ARTHUR J. DAHN, PETITIONER,

*v.*

JAMES C. DAVIS, AGENT DESIGNATED BY THE PRESIDENT UNDER SECTION 206 OF THE TRANSPORTATION ACT, APPROVED FEBRUARY 28, 1920, RESPONDENT.

## BRIEF FOR RESPONDENT.

JAMES M. BECK,
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*Attorneys for Respondent.*

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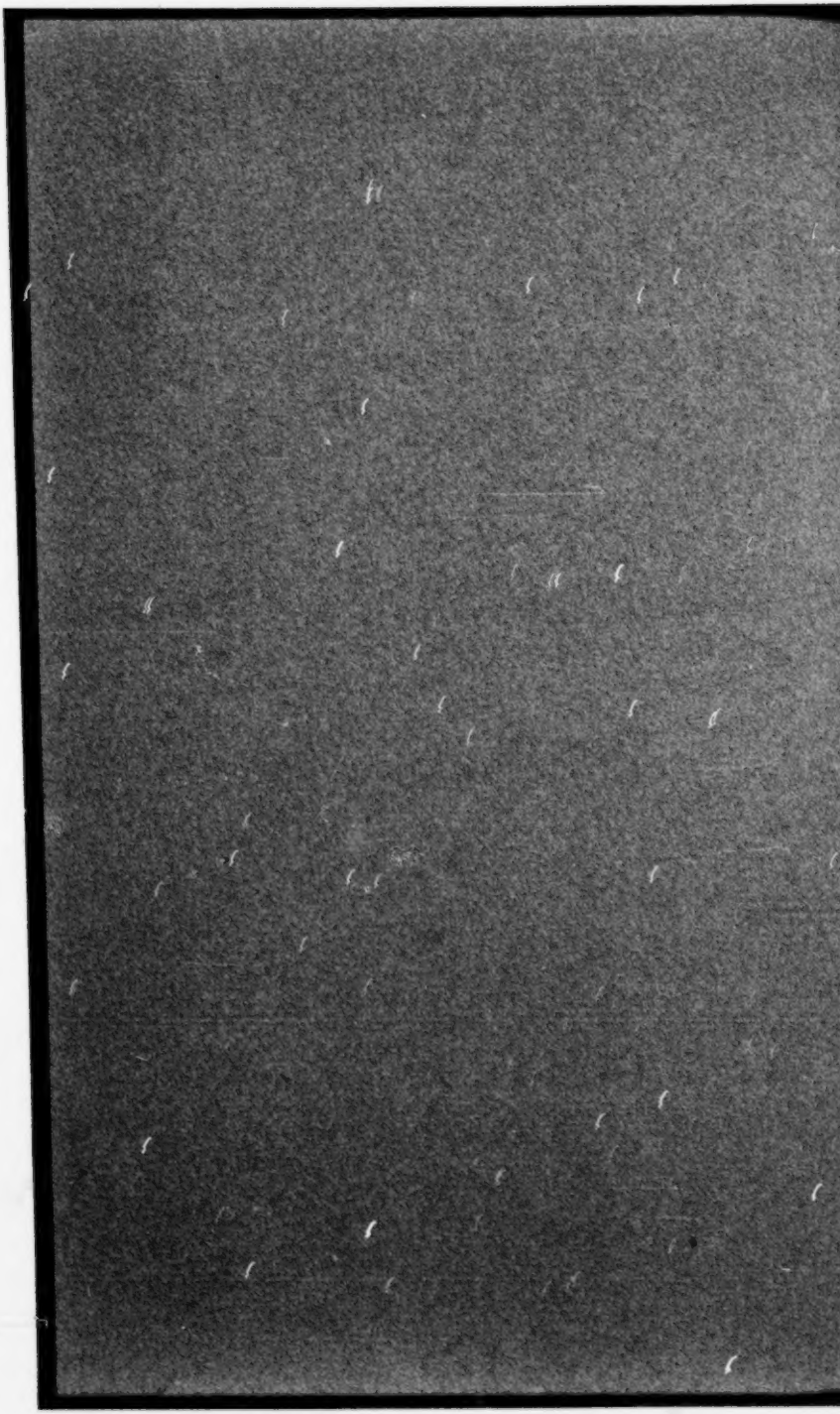

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# In the Supreme Court of the United States.

OCTOBER TERM, 1921.

ARTHUR J. DAHN, PETITIONER,
*v.*
JAMES C. DAVIS, AGENT DESIGNATED BY the President under section 206 of the transportation act, approved February 28, 1920, respondent. — No. 166.

## BRIEF FOR RESPONDENT.

### STATEMENT OF FACTS.

In addition to the statement of facts presented by petitioner, the court is advised that respondent, in addition to denying the allegations of negligence in petitioner's complaint, alleged that the accident complained of resulted from an act of God, through an extraordinary and unprecedented flood which washed out the supports of the bridge in question at such time and under such circumstances as precluded the existence of any negligence as a proximate cause of the accident.

In the Circuit Court of Appeals various errors were assigned in connection with the trial of the case,

which were not considered by the Circuit Court of Appeals on account of the conclusion reached that petitioner had elected to accept compensation under the Federal employees' compensation act and was therefore not entitled to recover in an action at law. In the concluding paragraph of the opinion of the Circuit Court of Appeals, it is stated:

> We are of the opinion that upon principle and authority the plaintiff is barred from maintaining this action for negligence against the United States which makes it unnecessary to consider assignments of error relating to the trial of the case.

## ARGUMENT.

### I.

**By accepting compensation from the United States under the Federal employees compensation act, being act of September 7, 1916 (39 Stat. 742), petitioner elected to adopt the remedy provided by the act and thereby waived all right, if any he had, to sue the United States at law to recover damages for his injuries.**

Petitioner was a railway mail clerk in the regular employ of the United States, as such, and while in the performance of his duties on a train on the Illinois Central Railroad in the possession of and being operated by the United States under Federal control, was injured in a wreck, the train going through a bridge as a result of a washout. After receiving such injury he made application in accordance with the statute for compensation for such

injury under and pursuant to the provisions of the Federal employees compensation act (39 Stat. 742). Compensation was allowed and paid to him. Thereafter he commenced this suit in the United States District Court for the Northern District of Iowa, seeking to recover damages for the injury sustained, alleging negligence in the operation of the railroad. By appropriate allegations respondent questioned right of petitioner to sue the United States, through the Director General, for such injuries. The District Court overruled respondent's contentions, but on same being presented to the Circuit Court of Appeals that court held the petitioner, by making application for and accepting compensation from the United States for the injury sustained, was barred from prosecuting this suit for damages for the same injury and that the suit is in truth and in fact a suit against the United States. We contend that the Circuit Court of Appeals properly applied the law applicable to this case, and properly held the suit to be against the United States, and that petitioner having accepted compensation from the United States was barred from suing the United States at law for the same injury.

**This suit is one against the United States.**

At the beginning of Federal control of railroads and for some time thereafter there was considerable confusion in the minds of some people and some courts as to whether the railroads under Federal control were being operated by the railway companies or the Gov-

ernment of the United States, and as to whether suits on causes of action arising out of their operation during Federal control should be brought against the railway companies or the Director General of Railroads. Happily such confusion and uncertainty has long since been removed. In the case of *Northern Pacific Railway* v. *State of North Dakota*, 250 U. S. 135, this court clarified the situation in the following language:

> A complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property for which it was authorized to take, the financial obligations under which it came and all the other duties and the actions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing?

Again, in the case of *Missouri Pacific* v. *Ault*, 256 U. S. ——, 41 Sup. Ct. Rep. 593, in which it was sought to hold the railway company liable for wages of an

employee of the director general in the operation of the company's system of transportation during Federal control, this court said:

> If the cause of action arose while the Government was operating the system the "carrier while under Federal control" was nevertheless to be liable and suable. This means, as a matter of law, that the Government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts. * * * The title by which suit should be brought—the person who should be named as defendant—was not designated in the act. In the absence of express direction, it was perhaps natural that those wishing to sue the carrier should have named the company as defendant when they sought to hold the Government liable. * * * As the Federal control act did not impose any liability upon the companies, on any cause of action arising out of the operation of their systems of transportation by the Government, the provision in Order No. 50 authorizing the substitution of the director general as defendant in suits then pending was within his power; the application of the Missouri Pacific Railway Co. that it be dismissed from this action should have been granted; and the judgment against it should, therefore, be reversed.

In that case a penalty was assessed by the lower court against the director general for failure to pay the wages involved within the time prescribed by the

Arkansas statute. This court held that while in section 10 of the Federal control act the United States had consented to be sued as to some causes of action, it had not consented to be sued for, or to be liable for, a penalty. In reversing the judgment against the Director General so far as the penalty was concerned, this court said:

> By these provisions the United States submitted itself to the various laws, State and Federal, which prescribe how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States arising out of the operation of the railroad were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the Government for a penalty, if it should fail to perform the legal obligations imposed. The Government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agent or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties, or to permit any other sovereignty to punish it.

A decision of this court ought not to have been necessary for the purpose of determining that it was the Government of the United States that was operating the railroads during Federal control. After the

decisions of this court in the cases above mentioned it ought not to be necessary to still argue that the Government of the United States was in possession of and operated the railroads during Federal control and was the responsible party in causes of action arising out of such operation, or that a suit against the agent of the Government entrusted with the duty of operating the railroads or acting for the Government in connection with Federal control, is a suit against the United States. Counsel for petitioner, however, in their brief proceed upon the theory that the railroads during Federal control were operated by a person "other than the United States," that judgments obtained against the Director General are against a person "other than the United States," and that such judgments when paid are paid by a person "other than the United States." When the theory upon which the petitioner's brief is presented is appreciated, the entire argument falls to the ground as inapplicable. It must be remembered that section 12 of the Federal control act provides—

> that moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States.

It must also be remembered that section 6 of the Federal control act appropriates $500,000,000 "out of any moneys in the Treasury not otherwise appropriated, which, together with any funds available from any operating income of said carriers, may

be used by the President as a revolving fund for the purpose of paying the expenses of Federal control, and so far as necessary the amount of just compensation, and to provide terminals, motive power, cars, and other necessary equipment, etc."

The act of Congress entitled "An act to supply a deficiency in the appropriation for carrying out the act entitled 'An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' approved March 1, 1918" (Federal control act) approved June 30, 1919, appropriated $750,000,000 in addition to be used for such purposes.

In section 202 of the transportation act of 1920 Congress reappropriated all unexpended balances in the said appropriations aforesaid, and all revenues remaining from the operation of the railroads under Federal control, all that thereafter might be received therefrom and in addition $200,000,000 to be used by the President to "adjust, settle, liquidate, and wind up all matters, including compensation, and all questions and disputes of whatsoever nature growing out of or incident to Federal control."

In section 210 of the transportation act of 1920, paragraph (e), Congress appropriated "out of any moneys in the Treasury not otherwise appropriated the sum of $300,000,000, which shall be used as a revolving fund for the purpose of making the loans provided for in this section, and for paying judgments, decrees, and awards referred to in subdivision (e) of section 206."

The judgments referred to in paragraph (e) of section 206 of the transportation act to be paid out of the appropriation of $300,000,000 made in said section 210 are judgments entered in

> actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier, etc.

It is thus seen that the Government not only took possession of and operated the railroads, but that it assumed the responsibility for such operation and made appropriations to pay the expense thereof, liabilities accruing therefrom, and compensation to the owners, amounting to more than a billion and a half dollars. Counsel for petitioner, however, argue, in effect, that a suit against the Government's agent upon a cause of action growing out of the performance of his duty in operating the railroads for the Government, is not a suit against the United States, and that although the United States has compensated him in accordance with its laws applicable thereto, the petitioner is still entitled to sue the United States for damages for the same injury and to recover a second compensation therefor. Petitioner contends that the money paid by the United States to him as compensation is not the same kind of money, or is derived in a different way from the money he seeks to have paid him as damages from the United States, and as a second and double compensation for the

same injury. The money appropriated to pay compensation does not, we think, have different earmarks from money appropriated out of the Treasury to pay damages incurred by claimants for injuries received on account of negligent operation of railroads under Federal control. The money the United States receives from income taxes, other internal revenue, or import duties, is not different, we think, from money received by the United States as revenues from the operation of the railroads under Federal control. The money is money of the United States in each instance. It has no earmarks, and if it were true that the revenues derived from the operation of the railroads were sufficient to pay all claims arising in connection therewith, such fact would furnish no reason, we think, for contending that while petitioner could not recover a second compensation, if the money to be paid must come from the same source in the Treasury as the money paid him as compensation, he can recover a second compensation if the money therefor comes from revenues derived from the operation of the railroads. The contention is, we think, absurd. It is notorious, however, that the revenues derived by the Government from the operation of the railroads fell far short of being sufficient to meet the obligations of the Government growing out of such operation. The transportation act was passed at the end of Federal control and contained appropriations amounting to $500,000,000, most of said amount being for the purpose of paying obligations which could not be paid out of revenues derived from

the operation of the railroads. The situation thus presented is that petitioner has received from the United States compensation for his injuries and he now contends that he is entitled to have the United States pay in addition thereto damages without reference to, and wholly apart from, the compensation he has already received. It seems clear that such a result was not intended by Congress and can not be accomplished.

The courts have uniformly held that a debt accruing out of the operation of railroads under Federal control, such as freight charges and the like, is a debt due the United States and that the United States is entitled to priority for such debt under section 3466, Revised Statutes. Such was the holding of the Circuit Court of Appeals for the Seventh Circuit in *In Re Hibner Oil Company*, 264 Fed. 677; also by the Circuit Court of Appeals of the First Circuit in *James C. Davis, Director General* v. *William L. Pullen, Receiver*, et al, decided January 6, 1922, not yet reported; also by the Circuit Court of Appeals of the Second Circuit in *In the matter of Tidewater Coal Exchange, Bankrupt*, opinion announced in February, 1922, not yet reported. The latter case involved the right of the Director General to vote at a creditors' meeting upon the selection of a trustee. The debt involved arose out of the operation of the railroads under Federal control and was based upon freight and demurrage charges. The other creditors resisted the right of the Director General to vote at the creditors' meeting on the ground that the debt was

due the United States, and under section 3466, Revised Statutes, entitled to priority, and that under section 56 (b) of the bankruptcy act, which provides—

> Creditors filing claims which are secured or have priority, shall not, in respect to such claims be entitled to vote at creditors' meetings,

the Director General was deprived of the right to vote on the question of selecting the trustee. In holding that the Director General did not have the right to vote at such meeting of creditors because the debt was one owing the United States, for which priority was provided by the statute referred to, the Circuit Court of Appeals of the Second Circuit said:

> The United States in operating the railroads during the period of Federal control was engaged in the performance of a governmental function and was not carrying on a merely private commercial enterprise. See *In Re Western Implement Company*, 166 Fed. 576. The director general in claiming on behalf of the United States the moneys arising out of the operation of the railroads is seeking to recover public money and he is acting in a governmental capacity as much as though the money to be recovered were taxes. See *Chesapeake & Delaware Canal Company* v. *U. S.*, 250 U. S. 123, 126, 127.

The foregoing language indicates that the Circuit Court of Appeals of the Second Circuit does not share with counsel for petitioner the view that public money is earmarked and that public money arising out of

~~the claim of the injured party against the Panama~~

the operation of the railroads is different from public money raised by taxation. Petitioner's rights do not depend upon whether a judgment in his behalf could be paid out of revenues derived from the operation of the railroads or must be paid out of money in the Treasury derived from taxation. If his rights should depend upon such difference in the source of the money of the United States, we think the court must take judicial notice of the fact that the revenues derived from the operation of the railroads have fallen short of the amount necessary to pay the liabilities incurred by the Government in connection with such operation by more than a billion and a half dollars, and the payment of the judgment, if any is obtained in this case, must be out of the appropriation of $300,000,000 provided for in section 210 of the transportation act. It must be remembered that in paragraph (e) of section 206 of the transportation act, the Director General is expressly required to pay judgments out of such appropriation. The suit is therefore a suit against the United States, and the judgment, if any is recovered, must be paid by the United States out of any moneys in the Treasury subject to the appropriation in section 210 of the transportation act.

**The United States has not consented to pay both compensation and damages for the same injury.**

The Federal compensation act in its present form was enacted in 1916. It applies to the class of employees of which petitioner was a member, and

provides "that the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty," etc. Detailed provisions are contained in the act in respect to the methods of applying for and awarding compensation, the amounts to be paid and conditions under which payments will be continued.

At the time of its enactment the Government owned all of the stock in the Panama Railroad. In section 41 of the act it was provided that if an injury or death, for which compensation is payable under the act, is caused under circumstances creating a legal liability in the Panama Railroad Co. to pay damages therefor, etc., no compensation should be payable until the person entitled thereto should release the Panama Railroad Co. from liability on account of the injury or death, or until he should assign to the United States his rights against the Panama Railroad Co. This language we think clearly expressed the ntention of Congress that an injured Federal employee should not be twice compensated for an injury at Government expense. Being the owner of all the stock of the Panama Railroad, the establishing of a liability against the Panama Railroad was of interest to the United States and to its disadvantage. In order, therefore, that the resources of the United States should not directly or indirectly be used to make a double compensation to the employee, Congress provided that no compensation should be paid until the claim of the injured party against the Panama

Railroad should be released or assigned to the United States.

We are of the opinion that the language of the compensation act, which provides that compensation *shall* be paid, etc., clearly indicates that Congress intended that the compensation act should furnish an exclusive remedy to an employee so far as any rights against the United States are concerned. Congress certainly intended that if an employee in the mail service should be injured by the operation of a mail wagon, or on a Government transport, or a vessel under the jurisdiction of the Navy, or in connection with the operations of the Army, the sole remedy of such employees should be under the compensation act. The circumstance that the Government acquired possession, control, and operation of the railroads, and thereby undertook the transportation of its own railway mail employees, ought not to justify the conclusion that as to such employees Congress intended to furnish a remedy for any injury other than under the compensation act. Certainly it must be concluded that Congress did not intend that an employee who took advantage of the provisions of the compensation act, and received compensation for his injury, should also be permitted to sue the United States through the Railroad Administration to recover a second time for the same injury. While we believe the compensation act furnishes an exclusive remedy to a railroad mail employee injured in the service, if it be conceded that he had the right to choose between the remedy furnished by the

compensation act and an action at law for damages, he did not have the right to both remedies, and having elected to pursue the one he is precluded from pursuing the other. That he was not entitled to enjoy both remedies we think must be clear.

Counsel for petitioner have discussed at great length decisions of the courts under the compensation acts of the various States which permitted the injured party, who has received compensation from his employer, to proceed against a third party, whose negligence caused the injury. Many State statutes of the character referred to provide for subrogation of the employer to the rights of the employee as against the negligent party to the extent of the payments made by the employer in some cases and in others to the full extent of the cause of action. Such statutes and the construction placed thereon by the courts do not aid petitioner in his contention. There is certainly a wide distinction between permitting one who has received compensation from his employer to recover damages from a negligent third person who caused his injury, there being no statute forbidding, and permitting an employee to receive compensation from his employer for his injury, and also sue his employer for damages on the theory of negligence, and thus recover a second time. It is the latter situation that is presented here. We do not question the right of an employee who has been compensated by his employer to recover full and complete damages from a negligent third person who caused his injury if the statutes of the State permit, but we do question

the right of an employee of the United States to recover compensation under the Federal compensation act, and having done so, and having retained such compensation, sue the United States through any of its agencies for damages for the same injury. While counsel have referred at length to the workmens' compensation acts of various States, they have not cited any State statute, or the decision of any court, which permitted the employee to recover both compensation and damages from his employer. We have been at some pains to examine the various State statutes and the decisions of the courts, and have been unable to find that any statute or any court has authorized such double compensation. We think it needs no argument to satisfy this court that a statute authorizing the payment of both compensation and damages to the employee for the same injury would be in violation of the Constitution of the United States, as a taking of employer's property without just compensation, and without due process of law.

**If petitioner can recover in this case he will not be obliged to refund to the United States any part of the compensation already paid him, for such requirement applies only to a recovery against a negligent third party "other than the United States."**

Section 26 of the Federal employees' compensation act provides:

> If an injury or death for which compensation is payable under this act is caused under circumstances creating a legal liability upon some person *other than the United States* to pay

damages therefor, the commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person, or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the commission may require said beneficiary to prosecute said action in his own name. If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the commission, he shall not be entitled to any compensation under this act. (The italics are ours.)

Section 27 of the act provides:

That if an injury or death for which compensation is payable under this act is caused under circumstances creating a legal liability in some person *other than the United States* to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the *costs of suit* and a reasonable *attorney's fee*, apply the money or other property so received in the following manner: (a) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same

> injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund. (b) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of same injury. (The italics are ours.)

It is thus seen Congress intended the United States to have the benefit, at least to the extent of payments made or to be made under the compensation act, of any liability of a person "other than the United States" to pay damages on account of the injury. The injured party could be required to assign the entire claim to the United States as a condition for receiving compensation. While it may be that if the recovery from the negligent third party, after paying attorney's fees and other expenses of litigation, should be in excess of the compensation authorized, the injured party would profit out of such recovery, such result would not always follow. In many cases there would be no recovery at all against the third party; in others, the expenses of litigation, including the attorney's fees, especially if on a contingent basis, would be such as to preclude the net amount of recovery exceeding the compensation. Whether the injured party would profit in any case on account of claim against the negligent third party would be problematical and speculative. The thought we wish most to impress on the court in this connection is that Congress made

provision for refunding, to the extent that it made payments under the compensation act, if the injured party recovered so much from the negligent party. Congress did not intend the injured party to have the benefit of such recovery except, possibly, to the extent such recovery exceeded the compensation paid, or to be paid, under the act.

In the case at bar, if the petitioner is permitted to recover in this suit, the recovery will not be against a person "other than the United States." On the contrary, the recovery will be against the United States. No representative of the Government has a right to require petitioner to refund to the United States any part of the recovery, if any, which the courts permit him to have in this action, since it is only out of recoveries against persons "other than the United States" that the law authorizes its representatives to require the petitioner to make refund of the compensation paid. If, therefore, petitioner is entitled to recover damages in this action against the United States, he is entitled to retain the full amount recovered, and thus have a complete double recovery or compensation for his single injury, and that from the United States. No other class of employers is subjected to such responsibility. Employees of no other employers are given such consideration. In view of the provisions of section 7 of the Federal compensation act, which reads:

> That as long as the employee is in receipt of compensation under this act, or, if he has been

> paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States,

we think a definite intent of Congress is shown contrary to petitioner's contention, and which precludes the idea of petitioner having a remedy for damages after having received compensation.

The provisions of the war risk act in respect to injuries occasioned by negligence of third persons, and in respect of subrogation of the United States to the rights of the injured parties against such third persons, are substantially identical with the provisions quoted from the Federal employees' compensation act. On May 4, 1921, the Attorney General rendered an opinion to the Secretary of the Treasury with regard to the duty of the Bureau of War Risk Insurance in respect to requiring an injured soldier or sailor making application for compensation to proceed against the Director General of Railroads for damages in cases where the soldier or sailor was injured because of negligence in the operation of the railroads under Federal control. The war risk insurance act permitted the Bureau of War Risk Insurance to require the injured soldier or sailor to proceed against any party "other than the United States," against whom a legal liability existed on ac-

count of injury. The Attorney General in such opinion held:

> I conclude from the above that the liability incurred by a railroad under Government control for an injury or death is a liability of the United States and not a liability of "some person other than the United States" within the language of section 313 of the war risk insurance act, and your first question is, therefore, answered in the negative.

A full and complete copy of the opinion of the Attorney General is contained in appendix attached hereto. We conclude this suit is not against "a person other than the United States," and, therefore, any recovery in favor of petitioner may be disposed of as he sees fit without obligation to refund any amount paid to him as compensation under the Federal employees' compensation act. If he is permitted to recover, then he recovers a second time for the same injury, which is clearly contrary to the intention of Congress, and would be an anomaly unprecedented in the law.

**Petitioner in applying for and receiving compensation elected to adopt that remedy.**

The doctrine is well established that where two different and inconsistent remedies are open to a party, and with full knowledge he adopts one of them, he is barred from thereafter pursuing the other. If therefore it be conceded that petitioner had the choice of recovering compensation or suing for damages, by

making application for compensation he irrevocably elected to pursue that remedy, and may not now successfully prosecute a suit for damages. This doctrine is discussed in *Robb* v. *Vos*, 155 U. S. 13, 41–43. Quoting from *Thompson* v. *Howard*, 31 Mich. 309, 312, which was a case where a father had brought an action for a minor son's wages and after the disagreement of the jury discontinued the suit and brought an action for the unlawful enticing away and harboring of the son, the court said:

> A man may not take contradictory positions; and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one with knowledge, or the means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again. The plaintiff's proceeding necessarily implied that the defendant had the young man's services during the time with plaintiff's assent, and this was absolutely repugnant to the foundation of this suit, which is, that the young man was drawn away and into defendant's service against the plaintiff's assent.

The Vos case involved the right to disaffirm a contract made by his agent without authority or to affirm the contract. The plaintiff brought a suit on the contract and afterwards undertook to repudiate

the contract. In holding that the first election was final, the court said:

> The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act.

The same thought is expressed in *Bierce* v. *Hutchins*, 205 U. S. 340, 346. In the case of *Shappirio* v. *Goldberg*, 192 U. S. 232, 242, this court said:

> It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must upon the discovery of the fraud announce his purpose and adhere to it. If he continues to treat the property as his own the right of rescission is gone, and the party will be held bound by the contract.

The same thought is presented in *Reints, etc.*, v. *Uhlenhopp*, 128, N. W. 400, 403; 149 Iowa 284, which involved an election made by bringing suit on a renewal note with sureties, the signature of one surety being forged. Plaintiff knew of such forgery at the time of bringing suit against the surety who actually signed. Subsequently it brought suit on the original note. The court held that it was bound by the election evidenced by bringing suit on the renewal note with knowledge that the signature of one surety was forged. The court there said:

> Plaintiff's conduct with reference to the second, the $11,000 note, was such as to justify a jury in finding that it had elected to pursue whatever remedy it might have thereon against the surety who actually signed the same, thus of necessity abandoning its claim on the first $10,000. * * * Plaintiff could not enforce both notes, and, if after knowledge of all the facts it concluded to rely upon the one for $11,000, it is bound by its election.

Petitioner could not recover both compensation and damages, and the same reason exists for saying that in applying for compensation and receiving same he elected conclusively to pursue that remedy and can not now sue for damages. In fact, we think the mere making of application for compensation constitutes an irrevocable election to pursue that remedy. He has gone further, however, and has actually received compensation. Another Iowa case involving the same principle is *Kearney Milling Co.* v. *Union Pacific Railway et al.*, 66 N. W. 1059, 1061–1062. A very full discussion of the doctrine is contained in the court's opinion, with illustrations of the application thereof. The rule is also stated in 20 Corpus Juris 38, as follows:

> An election once made between coexisting remedial rights which are inconsistent is not only irrevocable and can not be withdrawn without due consent, even though it has not been acted upon by another to his detriment, but it is also conclusive and constitutes an

> absolute bar to any action, suit, or proceeding based upon a remedial right inconsistent with that asserted by the election.

The statement of the author is abundantly sustained by authorities cited.

The doctrine was applied in *Standard Varnish Works* v. *Haydock*, 143 Fed. 318, C. C. A., Sixth Circuit, where a bankrupt obtained goods by fraudulent representation. They were not paid for. The seller had the right to confirm the sale and assume the position of a creditor for the price or repudiate the sale and recover the goods. He filed his claim for the price in the bankruptcy proceedings and voted as a creditor in selecting a trustee. It was held that he could not thereafter withdraw his claim and recover the goods. Unless petitioner is entitled to recover both compensation and damages, the adopting of the one course is inconsistent with the other, and under the universal rule announced he is bound by his choice and can not now recover damages.

In the case of *The Fred E. Sander*, 212 Fed. 545, 547–548, District Court, Western District of Washington, was involved the right of a workman who had received compensation under the workmen's compensation act of Washington, and who thereafter sued to recover damages by a proceeding in admiralty under Federal statutes. The facts were such as to give him a right to claim compensation under the Washington statute, and he contended that he was also entitled to recover damages in admiralty, under the Federal statute, from his employer. The Wash-

ington statute involves payment into a fund administered by the State by employers subject to the act. The compensation to the injured employee is made by State officials from this fund. The Washington act provides that the remedy is exclusive, and that "all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the State over such causes are hereby abolished except as in this act provided."

The injured party claimed that the exclusive remedy was only with respect to rights and causes of action enforceable in the State courts and that his right given by the Federal law to proceed in admiralty for damages against his employer was not affected by the State statute and that such right was still open to him, notwithstanding he had received compensation. The court held that while the exclusive provision of the State statute was with respect to remedies in State courts, still he was entitled to but one compensation for one injury and that having elected to take such compensation under the State law, he was precluded from recovering under the Federal law. In so holding the court said:

> But for the enactment of the workmen's compensation act of the State of Washington, libelant would have two remedies—one his common-law action for damages against the owners and the other a proceeding in admiralty. The selection of the one remedy would bar a proceeding in the other. A party can not enforce both remedies and will be

> required to elect whether to pursue his common-law remedy or proceed in admiralty. The workmen's compensation act, while it took away the common-law action, provided in its stead another remedy. If the libelant determined to obtain relief from the substitute which is provided for his common-law remedy, and received compensation under such act, then he can not proceed in admiralty and thus obtain double compensation for the injury of which he complains. An injured workman who has made claim for and received compensation under the workmen's compensation act has elected to accept under the act, and can not therefore raise an action in admiralty.

The same doctrine is announced in different language in *Hogan et ux.* v. *Buja*, 262 Fed. 224, District Court, Eastern District of Louisiana. The court said:

> The person injured, in a case of tort cognizable in admiralty may elect whether to proceed in admiralty, at common law, or under the provisions of the workmen's compensation law, where it exists. If a settlement has been made in this case in such a manner as to exclude any further recovery, that fact may be set up in defense, as courts of admiralty administer the broadest equity, and would not permit two recoveries for the same tort.

In *Texas, etc., Ry.* v. *Rigsby*, 241 U. S. 33, 36 Supt. Ct. Rept. 482, 60 L. Ed., 874, it was held that a cause of action is created by the Federal safety appliance act of itself, regardless of whether the em-

ployee is engaged in interstate commerce. In *Ross* v. *Schooley*, 257 Fed. 290–292, the Circuit Court of Appeals of the Seventh Circuit held that where an employee of an interstate carrier was injured while engaged in intrastate commerce, by reason of a defective safety appliance, he was entitled to recover under the safety appliance act, notwithstanding the existence of a State workmen's compensation act applicable to employees of the carrier involved while engaged in intrastate commerce. The same doctrine was announced by the Supreme Court of Minnesota in *Kraemer* v. *Chicago & North Western Railway Co.*, 181 N. W. 847–849. In such cases the employee could doubtless elect whether he would proceed for compensation under the State law or seek a recovery under the safety appliance act. We think no court would have any hesitation in saying that he could not recover under both laws, and that resorting to one remedy would constitute an irrevocable election to pursue that remedy and would preclude his changing his mind or making a new election to adopt the other remedy. If, however, petitioner can do so in this case we see no reason why an employee of a railway company under the circumstances suggested can not do the same thing. If petitioner is entitled to both compensation and damages, then an employee of a railway company under the circumstances disclosed, is entitled to recover from his employer both compensation and damages, the one under the State law, the other under the Federal law. It would, we

think, be a great injustice to the employer, whether a railway company or the United States, to permit the employee, after receiving the injury, to apply for and receive compensation, which is provided independent of the question of negligence, and having benefited by such remedy permit him to bring a suit at law and experiment in the courts at the expense of the employer in attempting to prove a liability based on negligence, and if he succeeds in the proceeding refund to the employer the amount received as compensation, if a sufficient amount remains to him after he has paid expenses of the litigation, including compensation to his attorney, measured by the usual percentage involved in a contingent fee. The employer ought not to be put to the responsibility of paying compensation and then also be subjected to onerous litigation at great expense while the employee experiments in an effort to establish negligence, even if a recovery in such action by the employee involves a duty and obligation on his part to refund the compensation he has already received. It is by no means certain that after paying the attorneys' fees and other expenses of litigation, there will be sufficient left to an employee, who succeeds in establishing negligence of the employer, to fully recompense the employer for the compensation already paid. In such a case the employee would not be benefited and the employer would be very greatly disadvantaged. The employer is thus put to the expense not only of defending himself in

the damage suit, but of also paying for attorneys' fees and expense of litigation incurred in behalf of the plaintiff. The law does not contemplate such a result. In the case at bar, however, there would not even be an obligation on the part of the petitioner to refund any part of the compensation that has been paid him, even if permitted to recover damages in this action, because he is only obligated to refund when the recovery is against a person "other than the United States." He would, therefore, if permitted to recover, as has already been argued in another division of this brief, have the right to retain the entire recovery, and thus enjoy a double compensation for his injury and subject the Government to a double payment.

**Consideration to be given section 10 of the Federal control act.**

Counsel for petitioner have called attention to some of the matters considered by the committees of Congress in connection with enactment of the Federal control act, including the suggestion that railway employees be confined to the remedy provided by the Federal employees' compensation act for injuries they might receive while in the employ of the Government in operating the railroads. They call attention to the fact that a representative of the Brotherhood of Railway Trainmen appeared before the committee and protested against the making of such provision, and insisted that railway employees ought to be permitted to retain the remedy for damages for injuries as though the railroads were

under private operation. The proposal to confine such employees to the remedy furnished by the compensation act was abandoned, and railway employees were permitted to recover damages for injuries resulting from negligence in the operation of the railroads. Counsel concede the provisions of the compensation act were broad enough to include railway employees, and that the Federal Employees' Compensation Commission had previously so held. The result of legislation as finally enacted probably permitted a railway employee to elect as to whether he would claim compensation for an injury or claim damages. Certainly the legislation did not have the effect of giving him the right to both remedies and a double compensation. While such is doubtless the conclusion to be drawn from the act of Congress, we are unable to see anything in the provisions of the act, or in the discussions before the committees of Congress, or before Congress, justifying the conclusion that railway mail clerks injured in the performance of their duties upon a Government operated train should be entitled to recover compensation, and thereafter sue the Government for damages. We are unable to discover anything in the matters referred to which justify the conclusion that because Congress desired railway employees to continue to have the remedies theretofore existing, a railway mail clerk entitled to the benefits of the Federal workmen's compensation act, should also be permitted to sue the Government for damages when injured while

performing his duties on a Government operated train. Certainly, we see nothing indicating that section 10 of the Federal control act was intended to give such railway mail clerk an additional remedy and additional compensation, or that would justify treating a suit against the Government operating the railroads as being against a person "other than the United States."

Counsel, however, say that the provision in section 10, which reads "and in any action at law, or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government," precludes the Government from saying that this is a suit against the United States, and from denying that petitioner is entitled to recover damages in addition to compensation. The contention we make is not contrary to such language in section 10 of the Federal control act. If the Director General had made a settlement with an employee having the right to claim damages, he could plead such fact as a defense to the employee's suit. The making application for compensation, the allowance thereof, and payment of same, is just as effective to defeat the employee's right as if he had made a settlement of a claim which he had a right to settle. When the Government pleads such application and allowance of compensation, it is not basing a defense upon the fact that the Railroad Administration is an agency or instrumentality of the Federal Government, but it is making a defense

which any employer could make under like circumstances. The defense the Government is making in this case is not based upon the fact that it is the Government, except in so far as the fact of its being the Government identifies the defendant in this suit with the employer who paid compensation, and emphasizes the thought that petitioner, after receiving compensation from his employer, is now suing his employer for damages for the same injuries.

**Workmen's compensation statutes are in furtherance of a public policy which seeks to avoid waste of litigation, uncertainty as to remedy and preserve to injured employees a maximum amount of charge upon industry on account of industrial accidents.**

Counsel have called attention to allowances made Government employees under the Federal employees' compensation act, where the amounts paid appear to be small as compared with the injury alleged to have been suffered. Whether attention is called thereto for the purpose of discrediting the Federal workmen's compensation act, or the administration of it is not clear. The terms of the act authorizing in proper cases the payments of sixty-six and sixty-seven hundredths dollars monthly, or $800 a year, are the best evidences of its character. We assume there have been many cases where the maximum allowance has been made, and many cases where allowances less than the maximum have been provided for. Compensation is based not on negligence of the Government, but upon the fact of injury to the employee in the performance of his duty. In many cases it must be a gratuity. The fact that the employee

named by counsel was carried on the pay roll, receiving regular wages or salary, of course explains the small allowances. It must be remembered that Congress provided that an employee should receive no other allowance from the Government, except wages or salary for services actually performed while receiving compensation, and save and except only pensions for service in the Army or Navy. Compensation is usually fixed at something less than the wages or salary being paid, and of course an employee will prefer to receive his salary during the time he is convalescing, to receiving the compensation provided for in less amount. The purpose of compensation generally is to insure to the injured party as great a portion as possible of the amount charged against industry and production, also a fair distribution among all injured employees. It became a matter of public concern that an employee seriously injured should recover nothing therefor because of contributory negligence, assumption of risk, or failure to prove negligence on the part of the employer, while other employees received large judgments, of which probably 50 per cent was claimed by the attorneys who prosecuted their suits. All such amounts were charged against the industry. The portion going to expenses of litigation and the attorneys was waste. To obviate such result and secure the injured employees uniform and equal justice and consideration, workmen's compensation acts were enacted, holding the employer liable independent of any question of

negligence, contributory negligence, or assumption of risk.

Workmen's compensation laws are among the most wholesome enactments of modern legislation, and should not be discredited by the illustrations counsel suggests. The payments made in the cases cited do not justify the conclusion that petitioner is entitled to recover damages in addition to the compensation provided by Congress. After all, it is the intent of Congress which is to be ascertained. Doubtless, Congress could give both remedies for the same injury so far as the Government is concerned. It could make the compensation law more liberal, and doubtless more acceptable to counsel for petitioner. Congress, however, has expressed the measure of responsibility the Government will assume. The amount that shall be paid in compensation is solely within the power of Congress to determine. It is for the court to ascertain and enforce the intention of Congress. In view of the provisions of the act, which are responsible for the small amounts paid the parties referred to by counsel, it is unthinkable that Congress intended petitioner to have the full benefits of its generosity as evidenced by the compensation act, and also that he should be permitted to recover damages for his injury, the amount thereof to be measured by the generosity of a jury of his peers.

## II.

**The Circuit Court of Appeals in remanding the case to the District Court properly directed that the complaint be dismissed.**

The conclusion of the Circuit Court of Appeals that petitioner, by accepting compensation, had elected to pursue that remedy, and was, therefore, barred from suing at law, required a dismissal of the complaint. The court might have remanded the case for further proceedings not inconsistent with the opinion of the Circuit Court of Appeals, but the only action the District Court could have taken in compliance with such instruction would be to dismiss the complaint, because any other action would be inconsistent with the conclusion of the Circuit Court of Appeals that he was barred from suing at law. It was, therefore, proper for the Circuit Court of Appeals to remand the case with the instruction that the complaint be dismissed. The case relied upon by the petitioner involved a question of fact which the jury had a right to pass upon, and the Appellate Court could not, of course, deprive the plaintiff of that right. In this case, the determination of the rights of the parties involve a question of law only, so that the Circuit Court of Appeals was entirely within its rights in so remanding the case. The order remanding does not, therefore, deprive the petitioner of any rights under the 7th Amendment to the Constitution.

In conclusion, we respectfully reassert that petitioner elected to receive compensation for his injury. Compensation has been allowed and paid to him. He is, therefore, barred from prosecuting this suit, and the conclusion reached by the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

JAMES M. BECK,
*Solicitor General.*
F. H. HELSELL,
ALBERT WARD,
A. A. MCLAUGHLIN,
*Attorneys for Respondent.*

## APPENDIX.

DEPARTMENT OF JUSTICE,
*Washington, May 4, 1921.*

DEAR MR. SECRETARY: This will acknowledge receipt of your letter of February 9, 1921, requesting my opinion upon the following propositions:

1. Has the Bureau of War Risk Insurance the right, or is it the duty of the Director of the Bureau of War Risk Insurance, in making an award to a person entitled to compensation under the provisions of the war risk insurance act who has been injured on a Federal controlled and operated railroad, to require as a condition of the award of compensation such person to prosecute his cause of action, if any, in his own name against the Director General of Railroads, United States Railroad Administration, or the corporation upon whose line the injury occurred, or to require such person to assign to the United States any right of action such person may have, if any, so as to enforce a claim for liability against the Director General of Railroads or the railroad corporation?

2. Is a person injured under conditions described in the first question, or his widow or other person to whom the cause of action accrued in the event of his death, barred from maintaining a suit brought against a railroad corporation or the Director General of Railroads, either or both, if the injured person or such other person has applied for and received compensation under the terms of the war risk insurance act?

Section 313 of the war risk insurance act as amended provides:

> (1) That if an injury or death for which compensation is payable under this article is caused under circumstances creating a legal liability upon some person other than the United States or the enemy to pay damages therefor, the director, as a condition to payment of compensation by the United States, may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person, or if it appears to be for the best interests of the beneficiary the director may require him to prosecute the said action in his own name, subject to regulations. The director may require such assignment or prosecution at any time after the injury or death, and the failure on the part of the beneficiary to so assign or to prosecute said cause of action in his own name within a reasonable time, to be fixed by the director, shall bar any right to compensation on account of the same injury or death. The cause of action so assigned to the United States may be prosecuted or compromised by the director, and any money realized or collected thereon, less the reasonable expenses of such realization or collection, shall be placed to the credit of the military and naval compensation appropriation. If the amount placed to the credit of such appropriation in such case is in excess of the amount of the award of compensation, if any, such excess shall be paid to the beneficiary after any compensation award for the same injury or death is made.
>
> If a beneficiary or conditional beneficiary shall have recovered, as a result of a suit brought by him or on his behalf, or as a result

of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such money or other property so recovered shall be credited upon any compensation payable, or which may become payable, to such beneficiary, or conditional beneficiary by the United States on account of the same injury or death.

(2) If an injury or death for which compensation may be payable under this article is caused under circumstances creating a legal liability upon some person other than the United States or the enemy to pay damages therefor, then, in order to preserve the right of action, the director may require the conditional beneficiary at any time after the injury or death to assign such right of action to the United States; or, if it appears to be for the best interests of such conditional beneficiary, to prosecute the said cause of action in his own name, subject to regulations. The failure on the part of the beneficiary to so assign or to prosecute the said cause of action in his own name within a reasonable time, to be fixed by the director, shall bar any right to compensation on account of the same injury or death. The cause of action so assigned may be prosecuted or compromised by the director, and any money realized or collected thereon, less the reasonable expenses of such realization or collection, shall be paid to such beneficiary, and be credited upon any future compensation which may become payable to such beneficiary by the United States on account of the same injury or death.

(3) The bureau shall make all necessary regulations for carrying out the purposes of this section. For the purposes of computation only under this section the total amount of compensation due any beneficiary shall be deemed to be equivalent to a lump sum equal

to the present value of all future payments of compensation computed as of the date of the award of compensation at four per centum, true discount, compounded annually. The probability of the beneficiary's death before the expiration of the period during which he is entitled to compensation shall be determined according to the American Experience Table of Mortality.

A conditional beneficiary is any person who may become entitled to compensation under this article on or after the death of the injured person.

Nothing in this section shall be construed to impose any administrative duties upon the War or Navy Departments.

From the language of this section it appears that it is applicable only to those cases in which the injury or death for which compensation is payable is caused under circumstances creating a legal liability upon some person other than the United States or the enemy. It therefore becomes necessary to determine whether such legal liability incurred by a railroad under Government control is a liability of the United States or of some other person.

By virtue of the power granted him by the act of August 29, the President, by proclamation issued December 26, 1917, took possession and assumed control of the railroad systems of the United States, and this possession and control the United States Supreme Court has held was complete and replaced entirely the previous possession and control of the private ownership theretofore existing. (Northern Pacific Railway Company *v.* North Dakota, 250 U. S. 135.)

This proclamation provided that possession, control, operation, and utilization of such transportation

systems should be exercised through the Director General of Railroads, and that "suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said director may, by general or special orders, otherwise determine."

On March 21, 1918, Congress enacted the Federal Control Act, by virtue of which all the earnings of the railroads were expressly made the property of the United States; and on October 28, 1918, the director general, in the administration of Federal control, issued his General Order No. 50, in which he recited that suits were being brought against the carrier corporations on matters based on causes of action arising under Federal control for which the said carrier corporations were not responsible, and directed that actions, including claims for death or injury to persons arising after December 31, 1917, and growing out of the possession, use, control, or operation of the railroads by the director general, and which but for Federal control might have been brought against the carrier company, should be brought against the director general.

It has been held in many jurisdictions that such actions as above, instituted against the Director General of Railroads, are in effect suits against the United States, and that the carrier companies are not liable. See—

*Pullman Co.* v. *Sweeney*, 269 Fed. 764.
*Bryson* v. *Hines*, 268 Fed. 290, 295.
*Mardis* v. *Hines*, 267 Fed. 171.
*Erie Railway Co.* v. *Caldwell*, 264 Fed. 947.
*Blevins* v. *Hines*, 264 Fed. 1005.
*Westbrook* v. *Director General of Railroads*, 263 Fed. 211.

*Smith* v. *Babcock & Wilcox Co.*, 260 Fed. 679.
*Nash* v. *Southern Pacific Co.*, 260 Fed. 280, 284.
*Haubert* v. *Baltimore & Ohio Ry. Co.*, 259 Fed. 361.
*Rutherford* v. *Union Pacific Co.*, 254 Fed. 880.

The transportation act of 1920 provides that actions which accrued during Federal control and which were previously directed to be brought against the director general, are, after the termination of such control, to be brought against an agent designated by the President for that purpose, and judgments, decrees, and awards in such actions are made payable out of a revolving fund created by section 210 of the act and appropriate from the Treasury of the United States.

I conclude from the above that the liability incurred by a railroad under Government control for an injury or death is a liability of the United States and not a liability of "some person other than the United States," within the language of section 313 of the War Risk Insurance Act, and your first question is therefore answered in the negative.

Your second question does not appear to me to present a proper matter for an opinion by the Attorney General, since it is not one arising in the administration of your department, but rather one for the benefit of claimants; it has always been the policy of the Attorney General to render opinions to the heads of executive departments only when such questions relate to matters calling for action or decision on their part.

20 Opinions of Attorney General, 463, 279, 251, 609, 724; 21 Opinions of Attorney General, 201, 172.

The Secretary of the Treasury is not called upon to render legal advice to persons claiming compensation under the war risk insurance act, or for injuries caused by operation of railroads under Federal control, and for these reasons I must decline to answer this question.

Respectfully,

H. M. DAUGHERTY,
*Attorney General.*

Hon. A. W. MELLON,
*Secretary of the Treasury,*
*Washington, D. C.*

○

IN THE

# Supreme Court of the United States

No.

ARTHUR J. DAHN,

*Petitioner,*

*vs.*

WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS OF THE UNITED STATES,

*Respondent.*

## PETITION OF ARTHUR J. DAHN FOR WRIT OF CERTIORARI.

*To the Honorable, the Supreme Court of the United States:*

The petition of Arthur J. Dahn, respectfully shows to the Court as follows:

1. He is a citizen of the United States and a resident of Dubuque County in the Northern District of Iowa, of which State he is a citizen.

2. On the 22nd day of November, 1918, he filed in the District Court of the United States in and for the Northern District of Iowa, Eastern Division, a suit against the Director General of Railroads of the United States, in which he claimed damages in the

sum of twenty thousand ($20,000) dollars, for personal injuries sustained by him while engaged in the performance of his duties as a railway mail clerk on a railway mail car attached to a train being operated on the lines of the Illinois Central Railroad Company, while said railway was then under the direction and control of the Director General of Railroads by virtue of the Acts of Congress and proclamation of the President of the United States thereunto empowering him.

3. In his petition filed in said District Court your petitioner charged certain acts of negligence by the said railway company in the construction of its road, and other acts of negligence by the Director General of Railways in its maintenance and operation, and invoked the jurisdiction of the Federal Court because of diversity of citizenship.

4. Said Director General in his answer contended:

(a) That the suit involved an action against the United States Government which was not liable in such a suit.

(b) That petitioner, being an employee of the United States, had, prior to the commencement of the action, applied for and received benefits under the Federal Employees Compensation Act, and that this had constituted an election to proceed exclusively under that Act, and barred his right to recover in this suit.

(c) That any recovery which might be had in this suit would be a recovery from the United States Government, and under the terms of said Compensation Act the amount of such recovery would have to be refunded to the Government, so that in no event could petitioner benefit thereby.

4. Petitioner demurred to the portions of the answer setting forth the above contentions, and the said District Court sustained the petitioner's demurrer thereto, to which ruling the respondent excepted. Issue was thereupon joined and the case was tried before a jury resulting in a verdict for the plaintiff in the sum of Seven Thousand Five Hundred ($7,500) Dollars, and judgment was, on the first day of August, 1919, entered on said verdict with interest and costs.

5. The case was taken by writ of error to the Circuit Court of Appeals for the Eighth Circuit, which Court on the second day of August, 1920, reversed this judgment with costs, and remanded the case to the said District Court with directions to dismiss your petitioner's complaint. On the third day of October, 1920, a mandate was issued out of said Circuit Court of Appeals pursuant to said judgment.

6. Your petitioner is advised that the said Circuit Court of Appeals was in error in reversing said judgment of the District Court and in ordering the said petition to be dismissed, but that on the contrary it should have affirmed the said judgment.

7. Your petitioner presents herewith in accordance with the rules of practice, a transcript of the record in said Circuit Court of Appeals, together with his assignment of errors and brief in support of his said petition.

8. Your petitioner further says that Walker D. Hines, named as plaintiff in error in the proceedings in the said United States Circuit Court of Appeals, has ceased to be the Director General of Railroads of

the United States, and that pursuant to law the President of the United States has appointed John Barton Payne as his agent to be substituted for the said Walker D. Hines in pending actions, suits and proceedings, so that the same shall not abate.

The premises considered your petitioner respectfully prays:

1. That a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit commanding said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in this case, which was entitled in that Court, to the end that said cause may be reviewed and determined by this Court as provided by law.

2. That the name of the said John Barton Payne may be substituted in the place of the said Walker D. Hines, Director General of Railroads.

3. And that your petitioner may have such other and further remedy in the premises as to this Court may seem appropriate, and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

ARTHUR J. DAHN,

By

WALTER C. CLEPHANE,
J. WILMER LATIMER,
*Attorneys.*

IN THE

# Supreme Court of the United States

No. 6[illegible]166

ARTHUR J. DAHN,
*Petitioner,*

vs.

WALKER D. HINES,
Director General of Railroads of the United States,
*Respondent.*

## BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

WALTER C. CLEPHANE,
J. WILMER LATIMER,
*Attorneys for Petitioner.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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No. ——.

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ARTHUR J. DAHN,
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vs.

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Director General of Railroads of the United States,
*Respondent.*

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## BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

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### STATEMENT OF FACTS.

Petitioner, a railway mail clerk in the employ of the United States Government, brought this action against the Illinois Central Railway Company and the respondent, the Director General of the Railroads of the United States, to recover damages for personal injuries sustained May 29, 1918, while petitioner was engaged in the performance of his duties on a mail car on the lines of the Illinois Central Railroad Company while the

same was being operated under the direction of the Director General of Railroads. The negligent acts charged were:

(a) The dangerous and unsafe construction and maintenance of a railway bridge at the point where the accident occurred.

(b) The operation of the train at an excessive and unsafe rate of speed.

(c) The failure to adequately patrol the track and give proper warning of its dangerous condition.

The suit was dismissed as against the Illinois Central Railroad Company on the ground that under the Act of Congress placing the railroad under Federal control and under the general orders issued by the Director General of Railroads, suits could not be brought against a railroad company which was being operated by the United States. (R., 4, 9.) Plaintiff recovered a verdict against the respondent in the sum of Seven Thousand Five Hundred Dollars ($7,500). (R., 203.) The petition invoked federal jurisdiction on the ground of diversity of citizenship. Respondent in his answer contended (R., 23-25, 273, 274):

(a) That this suit involved an action against the United States Government which is not liable in such a case as the present.

(b) That the plaintiff, being an employee of the United States, had, prior to the commencement of the action, applied for and received the benefits of the Federal Employees Compensation Act, and that this had constituted an election to proceed exclusively under that Act and barred his right to recover in this suit.

(c) That any recovery which might be had in this suit, would be a recovery from the United States Government and under the terms of the Federal Em-

ployees Compensation Act the amount of such recovery would have to be refunded to the Government, so that in no event could the petitioner benefit thereby.

The District Court sustained petitioner's demurrer to the portions of the answer setting forth the above contentions (R., 26-30-32), to which ruling the respondent excepted. (R., 30, 32.)

Respondent appealed from the judgment of the District Court based upon the verdict of the jury, to the United States Circuit Court of Appeals for the Eighth Circuit (R., 213-215), and that court on August 2, 1920, reversed the judgment below, and remanded the case with directions to dismiss the complaint. (R., 285, 286.)

## ASSIGNMENT OF ERRORS (R., 287-288).

1. Said Circuit Court of Appeals erred in entering judgment reversing the judgment of the District Court of the United States for the Northern District of Iowa, and in remanding the case with directions to dismiss the complaint of the plaintiff.

2. Said Circuit Court of Appeals erred in not affirming the judgment of the United States District Court aforesaid.

3. Said Circuit Court of Appeals erred in holding and deciding that this action is in legal effect a suit against the United States Government and not against the carrier corporation under Federal Control, that is, the Illinois Central Railroad Company.

4. Said Circuit Court of Appeals erred in holding and deciding that the term "carrier" or "carrier under Federal Control" as used in Section 10 of the Federal Control Act of March 21, 1918, does not mean or include the corporate entity, that is, the carrier corpora-

tion, in this case, the Illinois Central Railroad Company.

5. Said Circuit Court of Appeals erred in holding that plaintiff, having applied for and received compensation under Chapter 458 of the 1st Session of the 64th Congress, 39 Statutes, page 742, is barred from maintaining this suit.

6. The said Circuit Court of Appeals erred in holding and deciding that as to the United States the Employees Compensation Act aforesaid is exclusive of the right to sue the carrier under Federal Control if the employee (in this case the plaintiff) elects to pursue the remedy under it and he cannot pursue any other remedy.

7. Said Circuit Court of Appeals erred in rendering judgment aginst this plaintiff in error (former defendant in error) for costs of suit in said Circuit Court of Appeals.

## ARGUMENT.

These assignments of error may be condensed into the statement that the United States Circuit Court of Appeals for the Eighth Circuit erred in reversing the judgment below, by deciding that *a railway mail clerk who had presented to the Federal Employees Compensation Commission a claim under the Federal Employees Compensation Act and received the allowance of such a claim, had thereby made an election of remedies and was barred from suing the Director General of Railroads for compensation for injuries received while engaged in the performance of his duties upon a train operated under his direction.* (R., 283, 289.) The Court in reaching the above conclusion decided the following propositions:

A.

*That the suit was one against the United States.* (R., 280-281.)

B.

*That even if not a suit against the United States, a recovery against a person other than the United States would not inure to petitioner's benefit, but that the full amount of his recovery must be paid into the United States Treasury, so that the plaintiff would receive nothing other than his compensation under the Compensation Act.* (R., 283.)

## EFFECT OF DECISION.

Attached hereto and marked "Exhibit A" is a communication from the Federal Employees Compensation Commission indicating the importance of a decision by this Court upon the questions here involved. Inasmuch as the War Risk Insurance Act as amended (40 St., 609) is almost identical, in respect to the provisions now under consideration, with the Federal Employees Compensation Act, the administration of that act by the War Risk Insurance Bureau is necessarily similarly affected.

It is well-known that it has been the uniform practice of both of these bureaus of the Government to inform claimants that they have the right not only to claim compensation under the Acts by virtue of which these bureaus respectively operate, but that they may, in addition, pursue their common law or statutory remedy against those responsible for injuring these employees, and that many suits have been brought and are now pending, and many claims are

pending upon which suits have not been brought, which will be barred should the decision in this case remain unreversed. This practice has arisen by virtue of the language of the two statutes which were construed by the learned Court below.

Under the provisions of Sections 26 and 27 of the Compensation Act, the Commission may require the beneficiary to assign to the United States any right of action he may have to enforce the liability of another person, or the Commission may require the beneficiary to prosecute the action in his own name. Any recovery in such action shall be applied (1) to refund to the United States any compensation paid or to be paid the beneficiary on account of the injury which is the subject-matter of the action, and (2) the surplus shall be paid the beneficiary (39 Stat.. Chap. 458, page 742).

To determine what right of recovery there may be for injuries received on railroads under the operation of the Director General of Railroads, resort must be had to Section 10 of the Act of March 21, 1918, known as the Federal Control Act (40 Stat., 451). This Act provides:

> "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. *Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law;* and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier

is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any Act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control." (Italics ours.)

The scope of the compensation allowed under the Compensation Act, is very much more restricted than that authorized under the Common law. Under the Act disability compensation can be paid (with certain minor exceptions) *only during the continuance of the disability,* and even if the disability be *total,* the compensation *cannot exceed 66 2/3% of the employee's monthly pay* (unless the monthly pay is under $33.33, in which case the compensation may equal the pay), *and in no event may the compensation exceed $66.67 monthly.* (39 Stat., Chap. 458, p. 742, Secs. 3-6.) Even in case of death resulting from the injury the compensation paid is only a fraction of the salary *based upon a maximum salary of $100.* (Sec. 10.)

As illustrative of the hardships of the rule of law laid down by the learned Court below, the following cases taken from the records of the United States Employees Commission are pertinent:

James Robert Wheeler, employed at Camp Meade, was injured by the overturning of an automobile, necessitating *amputation of his leg above the knee.*

Compensation was paid for twenty-three days, amounting to $51.11, and at end of that time he was given employment at his previous salary, which discontinued his compensation. Under the rule announced, even if successful in a suit aginst the tort feasor, *the Government would receive the entire proceeds of the judgment for its own benefit exclusively.* So also in the following:

William D. Hapgood, while working in the Springfield Armory, was injured to such an extent as to lose an eye. He was paid for nine days disability, $16.50, and then returned to his former occupation.

Dave Parker, injured at Fort Sam Houston, lost his hand by amputation. His compensation amounted to $17.78, in addition to which forty-five days leave was granted.

John S. Holmes, Jr., injured at Galveston, Texas, completely lost the vision of one eye. Leave for thirty-one days was granted and *no compensation whatever made,* because he was restored to his position.

Archie A. McCallum, injured at Puget Sound Navy Yard, lost three fingers and part of a fourth. Total compensation of $35.56 was paid.

Frederick A. Porter, injured at Federal Building, Bellingham, Washington, lost his right hand. He took thirty-two days' leave which was due him, and the only compensation awarded was the payment of his medical bills and the cost of an artificial limb, as he then returned to his work.

These illustrations might be multiplied indefinitely. They are sufficient to indicate the hardships which will result if the decision below is permitted to stand, and the injured person deprived of all compensation other than what he may receive under the Compensation Act.

The beneficiaries of the War Risk Insurance Act, the provisions of which in this respect are almost identical with the Compensation Act, are likewise affected by the decision sought to be reviewed. For example:

Suppose a widow claiming the benefits of the Act, has received certain monthly payments allowed her under it. She has also recovered a large judgment against the party responsible for her husband's death. After receiving a few monthly payments she remarries. Heretofore it has been the practice for the Bureau to relinquish to her all of the judgment in excess of the amount due her under the War Risk Act. Hereafter that practice must be reversed and *the Government must retain the entire amount of the judgment* though it may have been collected from a third party. And it may be pertinently asked whether it will not now be the duty of the War Risk Bureau to take proceedings to recover back any moneys so paid to such beneficiaries, such sums amounting, as they must, to hundreds of thousands of dollars.

*The importance of this case from the public standpoint is thus apparent.*

What the case means to petitioner will be seen from the following facts:

He was performing his duties in the mail car in the middle of the night, when suddenly there was a crash, the electric lights went out and he became unconscious. When consciousness returned, he found himself suspended underneath the window partly out. He testified (R., 39): "The first thing I noticed was an awful burning underneath my arms and something pinning me in the back and the shrieks of the men that died. It was very dark * * *. I was suffering intense pain." His subsequent suffering, the extent of

his injuries, and the treatment administered, are set forth in detail in his testimony. (R., pp. 38-46.) Of the eight men (R., 38) who were in the mail car three died from their injuries (R., 76).

His pay at the time of the accident was $1,600, including an allowance of $100 for bed, etc. (R., 43). The maximum compensation which he can receive under the Compensation Act is $66.67 monthly, or $800 per year. (Sec. 6.) Even this pittance ceases the moment he is able to return to work and secures employment at a salary equivalent to the amount he was receiving prior to the accident; and, if his salary be not equal to that received prior thereto, his compensation, fixed by the act, is but 66 2/3% of the difference.

For those elements, therefore, that enter into a jury's award in the common law action for negligence, viz.: physical pain and suffering, mental anguish, compensation for permanent disfigurement, maiming or disability, and loss of earnings, the effect of the decision below is to deprive the petitioner, and other persons similarly situated, of all compensation save for a portion of his lost earnings; and any recovery by a government employee, on account of physical and mental suffering and of the disability sustained, from any third person or corporation whose negligence was the cause thereof, would not inure at all, under the decision below, to the benefit of the sufferer, but the whole would be covered into the Treasury of the United States.

The attention of the Court is now invited to the principles announced by the Court below as the basis for its conclusions:

A.

*That the suit is in effect one aginst the United States.*

The Court said (R., 280):

> "We are of the opinion that the present action was one in effect against the United States and that they will be obliged to pay the judgment below if sustained."

Unless the Court reached this conclusion it could not have arrived at the further conclusion that the petitioner by accepting the benefits of the Compensation Act, elected to waive his right to sue the Director General and thus barred himself from that remedy. It does not, on the other hand, follow that the affirmative solution of this proposition necessarily leads to the conclusion that such bar was created. But as the negative solution of this question is an insuperable obstacle to the final result reached, the question merits the most careful consideration.

Without attempting at this time on a mere application for a writ of *certiorari*, to argue the merits of this debatable point, its difficulty will be apparent from the following extract from the Court's opinion (R., 280, 281):

> "There are well reasoned cases in the Federal Courts sustaining the views herein expressed. They are Rutherford v. Union Pac., 254 Fed., 880; U. S. v. Kambeitz, 256 Fed., 247; Mardis v. Hines, 258 Fed., 945; Haubert v. Baltimore & Ohio R. R. Co., 259 Fed., 361; Nash v. Southern Pacific Co., 260 Fed., 280; Westbrook, *et al.*, v. Director General of Railroads, 263 Fed., 211; Hatcher & Snyder v. A. T. & S. F. Ry. Co., 258 Fed., 952; South-

ern Cotton Oil Co., v. Atlantic Coast Line Ry. Co., and Wade v. Seaboard Air Line Co., 257 Fed., 138; Sagona v. Pullman Co., 174 N. Y. S., 536; Oyler v. C. C. C. & St. L. Ry., 17 Ohio L. R., 356; Public Service Commission v. New England Telegraph & Telephone Co., 232 Mass., 465; McLeod v. New England Telegraph & Telephone Co., 250 U. S., 195; N. P. Railroad Co. v. State of North Dakota, 250 U. S., 135. There are other decisions construing Sec. 10 as providing for the bringing of actions against the carrier corporation just the same as if no Federal Control had taken place. The cases cited as deciding that it is the carrier corporation that must be sued are, Postal Tel. Co. v. Call, 225 Fed. 850; Jensen v. L. V. R. Co., 255 Fed., 795; Johnson v. McAdoo, 257 Fed. 757; Witherspoon v. Postal, etc., Co., 257 Fed., 758; The Catawissa, 257 Fed., 863; Dampskilbs v. Hustis, 257 Fed., 862; Lavelle v. N. P. R. Co., 172 N. W., 918; Gowan v. McAdoo, 173 N. W., 440; Palyo v. N. P. R. Co., 175 N. W., 687; Ringquist v. D. M. & N. R. Co., 176 N. W., 344; McGregor v. G. N. R. Co., 172 N. W., 841; Franke v. C. & N. W. R. Co., 173 N. W., 701; M. P. R. Co. v. Ault, 216 S. W., 3; Lancaster v. Keebler, 217 S. W., 1117; Clapp v. Am. Ex. Co., 125 N. E., 162; Owens v. Hines, 100 S. E., 617.

"It would serve no useful purpose to review these cases. *It is conceded that most of them declare the law contrary to the conclusion reached in this case, but the reasoning upon which the decisions are based is not persuasive.*" (Italics ours.)

One of the cases above cited as sustaining the proposition that placing the railroads under Federal control did not necessarily involve a suit against the United States for injuries committed while the railroad was under such control was Postal Tel. Co. v.

Call, *supra*, decided in the Circuit Court of Appeals for the 5th Circuit. So that there are now contrary opinions expressed by two of the Circuit Courts of Appeals, and the other Federal Courts as well as the State Courts are in hopeless conflict, *with the decided weight of authority aginst the view adopted by the Court below in this case.*

This irreconcilable difference among the authorities, and the importance of the question involved, are believed to justify the petitioner in asking that this Court review this case and make its authoritative decision of the question.

B.

*That any recovery of damages by a party who has availed himself of the benefits of the Compensation Act goes to the United States, and the employee realizes nothing.*

It is respectfully submitted that this conclusion was neither a necessary nor logical step to the final result reached by the Court. But the conclusion once reached made the whole case merely a moot one, and was doubtless the reason for the very brief and unsatisfactory manner in which the Court expressed its final views as to the proper disposition to be made of the case.

No decision has been found by either a court or ministerial officer, by an auditor or comptroller, in which the statute has thus been construed. Indeed, the language of the statute is so plain that, with all due respect to the wisdom of the court below, it would seem that the statute must have been inadvertently misread by the Court. The Act (Secs. 26-27, 39 Stat., 742), provides for two situations, 1st; the resort by

the beneficiary to the Compensation Act prior to suit, in which case the Commission may require him to assign his right of action to the United States; and 2d; the resort to the Compensation Act after recovery by suit, compromise or otherwise.

In the first case the amount realized by the Commission as the result of the assignment and prosecution of the action shall be applied in the following manner:

> "After deducting the amount of any compensation already paid to the beneficiary and the expenses of such realization or collection, which sum shall be placed to the credit of the employee's compensation fund, *the surplus, if any, shall be paid to the beneficiary* and credited upon any future payments of compensation payable to him on account of the same injury." (Italics ours.)

In the second case it is provided that

> "Such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:
>
> "(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees compensation fund."
>
> "(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury."

Thus the law expressly requires the United States in the first case *to refund to the beneficiary all the recovery except the amount paid him under the Compensation Act*, and in the second case, *permits the beneficiary to retain all except what is due him under the Compensation Act*. And yet the Court says (R., p. 283):

> "It plainly appears from the statute above quoted that whether the employee assigns his cause of action against a person other than the United States to the United States, and the same is prosecuted by said Commission or whether the employee prosecutes the cause of action himself, *the employee gains nothing but the whole recovery after deduction of the expense of litigation either goes into the compensation fund out of which employees are paid or is retained by the employee and the amount thereof is credited to the United States on future payments. So that in any event the employee realizes nothing from the liability of a person other than the United States. In this very case the plaintiff would receive nothing if he should collect his judgment other than his compensation under the Compensation Act.*" (Italics ours.)

This expression is incomprehensible to petitioner, in view of the unambiguous language of the Act. But having reached this viewpoint, it is not remarkable that the vital point in the case (which in the mind of the Court had become purely a moot question) should have received little consideration. That point is this:

C.

*Did the application by petitioner for the benefits of the Compensation Act, and the allowance of the ap-*

*plication, bar him from suing the Director General of Railroads?*

It is respectfully contended that even assuming the correctness of the Court's conclusion that a suit against the Director General is a suit against the United States, it by no means follows that the petitioner is barred from his remedy, because

1st. *Section 10 of the Control Act expressly provides to the contrary.*

2nd. *If the language of Section 10 is ambiguous, the history of the legislation can be resorted to and shows that such a result was never so intended.*

3rd. *There is nothing in either the Control Act or the Compensation Act to require an election.*

4th. *The Federal Employees Compensation Act differs in important particulars from the legislation of the States and the English and Scotch Acts cited by the Court.*

1st. *Section 10 of the Control Act expressly saves the remedy.*

It provides (40 Stat. 451):

> "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal Control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

The Federal Control Act was followed by General Order No. 50 of the Director General of Railroads, dated October 28, 1918, (R., 7, 8) which ordered

> "That actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claims for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal Control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise."

It is plain, therefore, that there can be no defence to this suit based upon the sole ground that it is a suit against the United States, and the learned Court below so held. (R., 279.)

2. *History of the Legislation.*

Should it be contended that there is any ambiguity about Section 10 so as to leave doubt as to whether the sovereignty of the United States was waived, the debates before the Committees of Congress clearly show that it never was the intent of Congress to deprive those injured on railroads of any right theretofore possed by them.

When the Act was pending before the Committee of Interstate and Foreign Commerce of the House of Representatives of the 65th Congress, second session, extensive hearings were had, the report of which is contained in a volume issued from the Government

Printing Office entitled: "Federal Operation of Transportation Systems. Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, January 8th to 29th, 1918."

The Act under consideration was drawn up by Honorable George W. Anderson, Commissioner of Interstate Commerce, at the request of the Government itself. During the extensive hearings on the subject he stated in answer to a question from Judge H. S. Cowan of Fort Worth, Texas (page 786).

> "Everything which is not inconsistent with the Federal Control, with this Act or with the Act of August 1, 1916, or with any order of the President made under either of these acts—all the rest of the law remains unchanged."

On pages 904-5 he says (referring to the language incorporated in Section 10 as above quoted):

> "That covers all cases tort or contract. It amounts to saying that except as otherwise provided by general or special order, the Government adopts the carrier corporations as agents for carrying on the operation under Federal Control, *and leaves rights and remedies to arise as they now arise.*"

And at page 910, he again says:

> "*You cannot go further or state it more plainly or briefly than I have stated when I put in the first five lines of Section 11 that except as otherwise provided by Congress or by the President—for that is what it means—these carriers remain individual carriers, subject to all existing liabilities, whether they arise under statutes or under common law.*"

The Congressional Record, 65th Congress, 2nd Session on H. R. 8172, in so far as the same applies to hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, discloses that the committee had before it the question of retaining or striking out a section then proposed, known as Section 9, designed to secure to railroad employees the right to receive compensation under the Federal Compensation Act as Government employees. The whole field of possible suits against the carriers under Federal Control upon causes of action arising during such Control was gone over but especially with reference to the right of railroad employes to sue for injuries. (See House Com. Report, pages 57 to 115; also pages 574 to 589; and 687 to 703.)

Mr. Doak, a representative of the Brotherhood of Railway Trainmen, appeared before the Committee to protest against the provision for compensation because it contained language making it exclusive of "all other rights and remedies of the person injured, his personal representatives, dependents, or next of kin, either at common law or by statute, whether Federal or State, against either the carrier or the United States on account of such injury or on account of the disability or death resulting therefrom." There was a long discussion, at the end of which Mr. Doremus of the Committee, produced Section 11 of the proposed bill which had been in the meantime changed to a form practically identical with Section 10 of the Act as finally passed. This Section 11 read as follows.

> "Section 11. That carriers while under Federal control, shall, in so far as is not inconsistent therewith, or with the provisions of this act, or any other act applicable to such Federal Control, or

with any order of the President, be subject to all laws and liabilities as common carriers, whether arising under statutes or at common law; and suits may be brought by and against such carriers and judgment rendered, as now provided by law."

Then this dialogue ensued:

Mr. Doremus. Then with section 9 stricken out, the rights of the employees upon railroads in this country—their right of action in all our courts, both common law and statutory—will be preserved as fully as those who are seeking redress for injuries to private property?

Mr. Doak. That is our position.

Mr. Dewalt. Let me ask, Mr. Doremus, that section 11 has been changed from what the original bill was.

Mr. Doremus. This is the proposed section.

Mr.Doak. It it broader than the other one, so it covers the point we were discussing.

Mr. Dewalt. I have not seen that new provision.

Mr. W. M. Clark. The fact of the matter is, Mr. Chairman, we just about had time to read section 9, and it was so different from the other section that we concentrated all our thoughts on that.

Mr. Barkley. This section as it is now proposed meets the contentions of you gentlemen with reference to the rights to sue for personal injury, does it not?

Mr. Doak. Yes sir; I think so.

Mr. Barkley. And eliminates the necessity for the original section 9?

Mr. Doak. Yes, sir; I think so. I think that is absolutely preserved under that.

Mr. Decker. Under section 11 as now written?

Mr. Doak. Yes, sir.

Mr. Snook. These words, "be subject to all laws and liabilities as common carriers, whether arising under statutes or at common law," will cover your case?

Mr. Doak. Yes; it is very materially changed. I didn't know that, because I read the old draft and have not had time to go over that at all. It answers all the questions, so the objection we have is that we don't want our present status interfered with, and by striking out section 9, with this provision in section 11—which I am certainly obliged to Mr. Doremus for calling my attention to—striking out section 9 I think we now have every thing just as it was before—all our rights preserved. Therefore, we will appreciate very much your consideration of that.

The Chairman. But you want the new section 9 stricken out?

Mr. Doak. We want section 9 stricken out of the bill.

The Chairman. And nothing substituted for it.

Mr. Doak. Nothing substituted for it.

It is not practicable to attempt further quotations from the record of these hearings, but it shows that the question of the right of railroad employes to sue for injuries received while the roads were under Federal Control was thoroughly considered. And we cannot believe that anyone, after reading this record of the hearings before the House Committee and considering the text of Section 10 of the Act as it finally passed, will doubt that its framers intended to make it broad enough to permit railroad employes (even though they became technically employes of the Government) as well as anyone else who suffered an injury because of the negligence of employes of railroads under Federal Control, to resort to the courts for redress just as they could before the roads were placed under such Control.

3. *There is nothing in the Control Act or Compensation Act to require an election.*

When the Compensation Act was passed there was no liability against the United States for torts committed by the Government. Obviously, therefore, there was no occasion to insert in the Act any provison to the effect that the reception of benefits under it was a waiver of any right of action against the United States. The Act did, however, carefully preserve the rights of beneficiaries thereunder to present claims and to institute suits against defendants other than the United States, even to the extent of permitting the Commission to require the beneficiary to assign to it any such claim, conferring authority upon such Commission to thereafter prosecute or compromise such claims. (Section 26, 39 Stat., p. 747.) It is true that Section 7 of the said Act is in the following language:

> So long as the employee is in receipt of compensation under this Act, or if he has been paid a lump sum in commutation of installment payments, until the the expiration of the period during which said installment payments would be continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever, except pension for service in the Army or Navy of the United States.

Plainly this does not prevent a claim being made against the United States, because it only precludes the making of such a claim (if such a claim could be made) "as long as the employee is in receipt of compensation under this Act," or "until the expiration of the period during which such installment payments would be continued." At the end of these periods he is left free

to pursue any remedy he might have had, if any such existed.

It is clear, therefore, that at the time the Federal Control Act was passed, the petitioner, a railway mail employee, had the right to sue the Illinois Central Railroad Company for any injury which might result to him from its negligence. Section 10 of the Act definitely allowed actions to be brought against carriers and "judgments rendered as now provided by law;" and enacted that "in any action at law or suit in equity against the carrier, no defense shall be made thereto on the ground that the carrier is an instrumentality or agency of the Federal Government." This section would seem to clearly indicate that the rights theretofore existing in Federal employees to sue railroad companies were not affected by the Railroad Control Act. Confirmation of this view is shown by the debate before the Committees of Congress hereinabove referred to.

Unless, therefore, there is something in the general purpose of the Employees Compensation Act, or something which by necessary inplication is to be read into that Act, to bar the petitioner's remedy by reason of his acceptance of benefits thereunder, it is submitted that the learned Court below erred in its conclusions in this regard. And this brings us to the discussion of the fourth point which is,

*4th.*

*The Federal Employees Compensation Act differs in important particulars from the legislation of the States and the English and Scotch Acts cited by the Court.*

The Court says (R., 284-285):

"That the employee cannot recover both damages and compensation is sustained by the following cases, Barry v. Bay State St. Ry. Co., 222 Mass., 366, 110 N. E., 1031, 1032; Turnquist v. Hannon, 219 Mass., 560, 107 N. E., 443; Cripp's Case, 216 Mass., 586, 104 N. E., 565, Ann. Cas. 1915B 828; Pawlak v. Hayes, 162 Wis., 503, 156 N. W., 464; McGravey v. Independent Oil, etc., Co., 156 Wis., 580, 146 N. W., 895; Woodcock v. London, etc., R. Co., (1913) 3 K. B., 139, 6 Butterworth's Workmen's Compensation Cases, 471; Page v. Burtwell (1908) 2 K. B., 758, 1 Butterworth's Workmen's Compensation Cases 267; Oliver v. Nautilus Steam Shipping Co., (1903) 2 K. B., 639, 5 Minton-Senhouse's Workmen's Compensation Cases 65; Huckle v. Council, 4 Butterworth's Workmen's Compensation Cases 113, (aff 3 Butterworth's Workmen's Compensation Cases 536, 26 T. L. R., 580; Mahomed v. Maunsell, 1 Butterworth's Workmen's Compensation Cases 269; Murry v. North British R. Co., 41 Scottish Law Rep., 383; Mulligan v. Dick, 41 Scottish Law Rep., 77; Tong v. Great Northern R. Co., 4 Minton Senhouse's Workmen's Compensation Cases 40, 86 L. T. Rep. N. S., 802; Workmen's Compensation Acts; *Corpus Juris Treatise*.

It is submitted that none of the cases referred to sustain the proposition stated. It is believed that the Court was mislead by the fact that in practically all of the Workmen's Compensation Acts, including those referred to by the Court in its opinion, there is an express provision that acceptance of benefits under the Act constitutes a waiver of the right to sue. With regard to the usual Compensation Act it is plain that the employee has two remedies, one against the employer under the common law, in which case certain defenses are available to the employer, such as con-

tributory negligence, negligence of fellow servant, etc., and in which the plaintiff must prove negligence, and the other under the Compensation Act, in which the employer is deprived of these defenses and in which the employee recovers without proof of negligence. In the latter the compensation received by the employee is usually much less than would be received as the result of litigation, but the result is generally much more expeditiously reached. In the latter, too, the plaintiff has no right of trial by jury, while if he pursues his common law remedy, he has. It is, therefore, a feature common to these Acts that the resort to the remedy under the statute constitutes a waiver of the right to sue at law, and this is usually expressly so stated.

The situation is, however, very different with regard to the rights of employees against the United States. Unless it be established that a suit against the Director General of Railroads during the temporary control by the United States of such roads, is a suit against the United States, the employee never had a right of action against the United States for a tort committed. He did not have that right when the Compensation Act was passed. He does not have it now. His only remedy is under the Compensation Law.

It is contended that plaintiff can recover in this case because of the express provision of Article 10 of the Control Act which, as it has been shown, was never intended to and did not abrogate his rights under the Compensation Act. It is not required that the United States "pay both compensation and damages for negligence to the same person for the same injury," as suggested by the learned Court below. (R., 284.) Whatever damage he may recover against the tort feasor

inures to the benefit of the United States to the extent of any compensation paid the employee under the Act, so that in no event can the United States be harmed by the mere fact that the employee has availed himself of the benefits of the Compensation Act.

An examination has been made of all of the cases referred to by the Court as supporting its conclusion that an election has taken place here which has barred the plaintiff's remedy in this suit. In each of them there is an express statutory provision to the effect that the acceptance of benefits under the Act is a waiver of the common law right. For instance, Sec. 15 of the Massachusetts Act upon which the decision in Turnquist v. Hannon, *supra*, was based, enacts that "the employee may at his option proceed either at law against that person to recover damages or against the association for compensation under this Act, *but not against both.*" 219 Mass., 560, 107 N. E., 443.

In Shade vs. Ashgrove Lime, etc., Co., *supra*, also cited by the Court in support of its opinion, the Court said, construing the Kansas legislation there involved,

> *While it is true that such compensation acts do not exclude other remedies in the absence of provisions to that effect*, yet by the terms of the statute itself, such remedies are excluded when both employer and employee are under its provisions. (Italics ours.)
>
> 92 Kans., 146; 139 Pac., 1193.

This citation, therefore, is a direct authority for the converse of the proposition decided by the learned Court below.

For the reasons stated the petitioner prays that this Court will issue to the United States Circuit Court of

Appeals for the Eighth Circuit a writ of certiorari commanding it to send up the record in this case in order that the same may be inquired into and the action of said Court reversed and set aside, and that your petitioner may have such other and further relief as the nature of the case may require and to the Court may seem proper.

.....

.....

WALTER C. CLEPHANE,
J. WILMER LATIMER,
*Attorneys for Petitioner.*

(Exhibit A follows on page 28.)

## EXHIBIT A.

October 29, 1920.

MESSRS. CLEPHANE & LATIMER,
Attorneys-at-Law,
Wilkins Building,
Washington, D. C.

GENTLEMEN:

The United States Employees' Compensation Commission understands that Arthur H. Dahn, defendant-in-error in the United States Circuit Court of Appeals for the Eighth Circuit, is seeking through your office to secure a review by the Supreme Court of the United States of an adverse judgment by the Circuit Court of Appeals for the Eighth Circuit, in his suit against Walker D. Hines, Director General of Railroads.

While this Commission is not a party to that suit, it is, nevertheless, vitally interested in having the decision reviewed by the Supreme Court of the United States as the same affects the action of this Commission in a great many cases, arising under the Employees Compensation Act (39 Stat., 742).

We, therefore, trust that you may, in some proper way, make this fact known to the Court in your petition for a review of the decision of the Circuit Court of Appeals.

Very truly yours,

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION.

By FRANCES C. AXTELL,
*Acting Chairman.*

# DAHN *v.* DAVIS, AGENT, ETC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 166. Argued March 10, 13, 1922.—Decided April 10, 1922.

A postal employee of the United States, injured while in the performance of his duty on a railroad operated at the time by the Director General of Railroads under the Federal Control Act, c. 25, 40 Stat. 451, and who elected to accept, and received, compensation therefor under the Federal Employees' Compensation Act, c. 458, 39 Stat. 742, was thereby debarred from an action against the Director General for negligence causing the injury. P. 428.

267 Fed. 105, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing a judgment of the District Court for the present petitioner in his action for damages against John Barton Payne, as Director General of Railroads. James C. Davis, successor of Mr. Payne as Director General, was substituted as respondent by order of this court, he having been designated by the President as agent for the defense of such actions under § 206 of the Transportation Act, 1920, c. 91, 41 Stat. 456, 461.

*Mr. Walter C. Clephane,* with whom *Mr. J. Wilmer Latimer* was on the brief, for petitioner.

The receipt of benefit under the Compensation Act does not constitute an election barring the plaintiff of

his remedy. If this were a suit against the United States in the ordinary sense, so that a judgment would have to be paid out of its public moneys derived through its taxing power and other ordinary sources of revenue, then it would follow that the judgment in this case would be paid out of the public moneys generally, the same source from which beneficiaries under the Compensation Act derive their compensation. This, however, is not the case. The railways while under federal control were never considered to be an integral part of the governmental system. In consenting that the Director General might be sued, Congress provided in the Control Act an elaborate scheme whereby judgments should be paid out of the railway operating income under the rules of the Interstate Commerce Commission. Federal Control Act, § 12; *Johnson* v. *McAdoo*, 257 Fed. 757.

The compensation to be paid by the United States to a railroad is an amount "not exceeding a sum equivalent as nearly as may be to its average annual operating income for the three years ended June thirtieth, nineteen hundred and seventeen," and it is only such operating income "in excess of such just compensation" as remains the property of the United States. 40 Stat. 452. In determining the "average annual railway operating income" which is to be the basis of payment, judgments against the roads have, under the rules of the Interstate Commerce Commission, been deducted. *Johnson* v. *McAdoo, supra.* The act also puts federal taxes on the same basis, and provides a similar deduction for them. 40 Stat. 452. So far as known, it has never been contended that the federal taxes assessed against the railroads are paid from the Government's own treasury. *Haubert* v. *Baltimore & Ohio R. R. Co.*, 259 Fed. 361.

If executive construction of the Control Act be resorted to, there is ample support for this position. There

is not the same reason for a statutory application of the doctrine of election under these circumstances as exists in the case of the ordinary private employer. Possibly partly for this reason, Congress has not seen fit to require an election to be made.

The Compensation Act was passed before the Control Act, and at a time when a postal clerk unquestionably had a right of action against a railway company by whose negligent act he was injured, but had no redress of any kind against the United States for its negligent act. *Bigby* v. *United States*, 188 U. S. 400.

The mind at once leaps to the question whether it can be possible that Congress intended that, by the mere act of taking the railroads under federal control as an emergency measure, a railway mail clerk should thereby be deprived of his theretofore unquestioned property right to sue and recover for injuries received through negligence such as was charged and proved in this case.

When the Compensation Act was passed the United States could not be sued for torts committed by it. Obviously, therefore, there was no occasion to insert in the act any provision to the effect that the reception of benefits under it was a waiver of any right of action against the United States. The act did, however, carefully preserve the rights of beneficiaries thereunder to present claims and to institute suits against defendants "other than the United States," even to the extent of permitting the commission to require the beneficiary to assign to it any such claim, and conferring authority upon such commission to thereafter prosecute or compromise such claims. (§ 26, 39 Stat. 747.) There is no peculiar significance in the language "other than the United States." This is substantially the phrase which is almost universally used in the compensation acts of the various

States, providing, as they do, for the assignment to the employer of claims by the employee against third parties, so that the employer may be subrogated *pro tanto* to the extent of payments made by him.

Section 7 of the Compensation Act does not prevent a claim being made against the United States, because it only precludes the making of such a claim "so long as the employee is in receipt of compensation under this act," or "until the expiration of the period during which such installment payments would be continued." At the end of these periods he is left free to pursue any remedy he might have, if any such exists.

Furthermore, the meaning of the word "remuneration" as used in the act is clearly limited by the words "salary" and "pay" which are used in conjunction with it in the enumeration. The clear intention here seems to be that while receiving the compensation provided by the act, the employee is to receive nothing in the nature of salary; he is to be cut off the payroll except as to the pay already accrued for services performed. The act is pensional in character and is in the nature of accident insurance furnished by the Government to its employees.

The language of § 41 is significant. The Panama Railroad Company was the only railroad owned and controlled entirely by the Federal Government when the Compensation Act was passed, and the language of § 41 is eloquent proof that Congress recognized the right of action on behalf of a government employee, notwithstanding such absolute government control and ownership. It is clear from this language that Congress had no thought that the right to compensation provided by the act was exclusive of any other remedy against the railroad company, even though the Government did absolutely own and control it.

If the language of § 10 of the Control Act is ambiguous, the history of the legislation can be resorted to. This

shows that an election was never intended. Hearings, 65th Cong., 2d sess., on H. R. 8172.

From the omission in the Control Act of a provision similar to the one relating to the Panama Railroad in the Compensation Act, the conclusion seems unescapable that Congress deliberately chose not to subject plaintiffs to the doctrine of election.

It is clear that at the time the Federal Control Act was passed, the petitioner, a railway mail employee, had the right to sue the Illinois Central Railroad Company for any injury which might have resulted to him from its negligence. Any cause of action in his favor created a legal liability against some party "other than the United States." Section 10 definitely allowed actions to be brought against carriers and "judgments rendered as now provided by law;" and enacted that "in any action at law or suit in equity against the carrier, no defense shall be made thereto on the ground that the carrier is an instrumentality or agency of the Federal Government." This section indicates that the rights theretofore existing in federal employees to sue railroad companies were not affected by the Railroad Control Act. Unless, therefore, there is something in the general purpose of the Employees' Compensation Act, or something which by necessary implication is read into that act, to bar the petitioner's remedy by reason of his acceptance of benefits thereunder, it is submitted that the court below erred in its conclusions.

The Federal Employees' Compensation Act differs in important particulars from the state and English and Scotch acts, cited by the court below.

Must the claimant refund to the Government the amount recovered? The act (§§ 26, 27) provides for two situations: (1) The resort by the beneficiary to the Compensation Act prior to suit, in which case the commission may require him to assign his right of action to

the United States; and (2) the resort to the Compensation Act after recovery by suit, compromise or otherwise. It expressly requires the United States, in the first case to refund to the beneficiary all the recovery except the amount paid him under the Compensation Act, and in the second case, permits the beneficiary to retain all except the amount which has been paid or may be payable to him under the Compensation Act.

With the exception of a very few States, it is believed that the customary legislation permits the claimant to receive and retain the benefit of any excess; and this, petitioner contends, is what the Federal Compensation Act has done. Bulletin, U. S. Bureau of Labor Statistics, Jan. 1921, No. 272, pp. 193 *et seq.; Houlihan* v. *Sulzberger & Sons Co.*, 282 Ill. 76; *Otis Elevator Co.* v. *Miller & Paine*, 240 Fed. 376.

The court below appears to have been impressed with the idea that if recovery were allowed in this case, the employee would recover double compensation. It is believed that the error of this view has been clearly demonstrated, and that this court will be convinced, from the terms of the act itself, that petitioner must reimburse the Compensation Commission from the amount recovered in this suit for the amount paid him by it, and that petitioner would retain only the surplus.

This decision, if unreversed, will have the effect of revolutionizing the practice in two of the Government Bureaus, viz: the Veterans' Bureau and the Federal Employees' Compensation Commission. The beneficiaries of the War Risk Insurance Act, the provisions of which in this respect are almost identical with the Compensation Act, are likewise affected by the decision.

*Mr. A. A. McLaughlin*, with whom *Mr. Solicitor General Beck*, *Mr. F. H. Helsell* and *Mr. Albert Ward* were on the brief, for respondent.

MR. JUSTICE CLARKE delivered the opinion of the court.

The petitioner, a railway mail clerk in the employ of the United States, was injured on May 29, 1918, when the car in which he was working was wrecked on the line of the Illinois Central Railroad, then being operated by the Director General of Railroads under the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451. He brought this suit to recover for his injuries against the Illinois Central Railroad Company and the Director General of Railroads, but the former was dismissed from the case on demurrer. Among other defenses, the Director General of Railroads alleged in his answer that the petitioner, as an employee of the United States, had made application for, and pursuant to its provisions had been paid, compensation under the provisions of the Federal Employees' Compensation Act (39 Stat. 742), and that thereby this further action, which is, in effect, against the United States, was barred. A demurrer to this last defense was sustained and the petitioner obtained a verdict on which the District Court entered judgment. On error this judgment was reversed by the Circuit Court of Appeals, that court holding that the petitioner had his option under the law to apply for compensation under the Employees' Compensation Act, as he did, or to sue for damages under the Federal Control Act (c. 25, 40 Stat. 451), and that, by electing to accept the benefits of the former, he was barred from prosecuting this action for negligence against the United States under the latter.

Thus, the writ of certiorari brings up for review the question whether, when a government employee, injured on a railroad, operated at the time by the Director General of Railroads, had elected to accept payment under the Federal Employees' Compensation Act, he was thereby barred from prosecuting a suit against the Director Gen-

eral of Railroads for negligence causing the injury for which he had been compensated.

James C. Davis, the Agent designated by the President under § 206 of the Transportation Act 1920, c. 91, 41 Stat. 456, has been substituted for the Director General of Railroads as respondent.

It was definitely held in *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554, that, at all of the times here involved, § 10 of the Federal Control Act permitted the Government, through its Director General of Railroads, to be sued for any injury negligently caused on any line of railway in his custody, precisely as a common carrier corporation operating such road might have been sued, and that recovery, if any, would be from the United States.

Thus, plainly the petitioner had the right to sue the Director General of Railroads for negligently injuring him, and if successful his recovery must have been from the United States.

The Federal Employees' Compensation Act, approved September 7, 1916, c. 458, 39 Stat. 742, provides that the United States shall thereafter pay, as therein specified, for the disability or death of any government employee resulting from personal injury sustained while in the performance of his duty. The act provides for a commission to investigate claims and to make awards, but no compensation may be allowed to any person unless he, or some one in his behalf, shall make written claim therefor. Thus, the petitioner, injured, as he was, while in the performance of his duty, was entitled to compensation under the act upon making claim for it.

This reference to the two acts shows that the petitioner had two remedies, each for the same wrong, and both against the United States, and therefore the question for decision takes the form, May the petitioner, after having pursued one of his remedies to a conclusion and payment,

pursue the other for a second satisfaction of the same wrong against the Government?

That this question must be answered in the negative we think clear from various provisions in the Compensation Act, showing that Congress intended that payments made under it should be regarded as full and final and that no payment in addition thereto would be made by the Government to an injured employee.

Section 7 of the act specifically declares that so long as any employee is receiving installment payments under the act, or if he has been paid a lump sum in commutation of installment payments, then until the expiration of the period during which installment payments would have continued, "he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed," and except pensions for service in the Army or Navy.

It would be difficult to frame a clearer declaration than this that no payment would be made by the Government for injuries received other than as provided for in the act.

Section 26 provides that, "if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability upon some person *other than the United States* to pay damages therefor," the Commission may require an assignment to the United States of the right to enforce such liability or to share in any money received in satisfaction thereof, or it may require the beneficiary to prosecute an action for damages in his own name. Refusal to make such assignment or to prosecute such action, when requested by the Commission, shall forfeit all right to compensation. This section also provides that if the Commission shall realize on such claim against third persons, either by suit or settlement, it shall apply the net proceeds to reimbursing the "Employees' Compensation Fund" for pay-

ments theretofore made, and any surplus remaining shall be paid to the beneficiary and credited on future compensation payable for the same injury. If the amount of recovery exceeded the payments made and to be made, obviously the beneficiary would be entitled to the excess.

Section 27 also provides for cases in which death or injury, for which compensation is payable under the act, is caused under circumstances "creating a legal liability in some person *other than the United States* to pay damages" but in which the beneficiary, instead of the Commission, receives the proceeds of suit or settlement. Here it is required that such beneficiary shall refund to the United States from such proceeds the amount of any compensation that has been paid to him by the Government or shall credit the money so received upon any compensation payable to him for the same injury.

Plainly, by these two sections Congress deals with the liability of persons "*other than the United States*" to employees entitled to compensation under the act, not for the purpose of increasing that compensation, but for the purpose of reimbursing the Government for payments made and of indemnifying it against other amounts payable in the future. The sections emphasize the disposition to treat the compensation provided for as adequate for the injuries received, and they negative any intention on the part of the Government to make further payments.

But § 41 is even more convincing to the point we are considering. A special proviso in this section declares that if the injury or death for which compensation is payable under the act is caused under circumstances creating a legal liability in the Panama Railroad Company to pay damage therefor "no compensation shall be payable until the person" shall release to the Railroad Company any right of action he may have against it or until he assigns to the United States any rights

which he may have to share in any money or other property received in satisfaction of such liability.

When the Compensation Act was passed the United States was the owner of all the capital stock of the Panama Railroad Company and as such was ultimately liable for the torts of that company just as it became liable for the torts of the Director General of Railroads under the Federal Control Act, and, therefore, this manner of dealing with the liability of that company to employees negligently injured is highly persuasive as to the congressional intent.

This Compensation Act is the expression of a slowly developed purpose on the part of the United States (1908,—35 Stat. 556; 1912,—37 Stat. 74; 1916,—39 Stat. 742), to give compensation to its employees, who otherwise would be without remedy when injured by fault of the Government, and the provisions of it which we have discussed convince us that the congressional purpose was that when the compensation was accepted no further payment should be made by the Government. The act does not contemplate or provide for suits against the Government. On the contrary, it is essentially an act of justice or of grace on the part of the United States, elaborately and carefully worked out, and designed to compensate, promptly, without litigation or expense, all employees injured while in discharge of duty, in an amount, which, on the average, was thought adequate and just. The amount of the award in each case is determined by a specially constituted commission, without cost to the claimant, and it is allowed wholly without regard to the negligence of the Government or its employees.

On the other hand, the right to sue the United States under the Federal Control Act, applicable to all persons alike, is on the basis of negligence, precisely as if the Government were an operating common carrier corporation,

and it is subject to all of the expense, delay and hazard usual in cases of that character. The Compensation Act deals only with, and confers rights only upon, employees of the Government, who must necessarily be but a small percentage of those authorized to sue under the Federal Control Act, and it is impossible for us to conclude that Congress intended by the enactment of the latter law to allow an employee to claim and receive the compensation specially provided for him under the former and then, while enjoying that benefit, to institute suit against the Government under the Federal Control Act, which might require it to make further payment for the same injury and which must, in all cases, subject it to expensive, harrassing and often long protracted litigation.

We find no language in the Federal Control Act inconsistent with the distinct expression of purpose on the part of Congress which we have found in the Compensation Act, to treat the payments under it as sufficient and final, and for the reasons stated in the discussion herein of the latter act and because the petitioner elected to pursue to payment the remedy given him thereunder, we agree with the Circuit Court of Appeals that his right of action asserted in this case was barred and the judgment of that court is therefore

*Affirmed.*